

United States
Court of Appeals
for the Ninth Circuit

GLENN WOODBURY and PEARL WOOD-
BURY, Appellants,

vs.

ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Montana

FILED

NOV - 1 1955

PAUL P. O'BRIEN, CLERK

No. 14782

United States
Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the District
of Montana, Missoula Division

No. 382

ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Plaintiffs,

vs.

GLENN WOODBURY AND PEARL WOOD-
BURY, Defendants.

COMPLAINT

Come now the plaintiffs and for their first cause
of action, allege:

I.

That the plaintiffs are citizens of the Dominion
of Canada. That the defendants are citizens of the
State of Montana. That the amount in controversy
herein exceeds the sum of Three Thousand Dollars
(\$3,000.00) exclusive of interest and costs.

II.

That on or about the 2nd day of May, 1953, the
plaintiffs and the defendants entered into a written
contract, a copy of which is attached hereto marked
Exhibit "A" and by this reference made a part
hereof. That the Jannsen farm referred to in Ex-
hibit "A", which is the subject of the contract be-
tween the parties, consists of the following described
tract of land, to-wit:

The North Half of the Northeast Quarter of the Southeast Quarter ($N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$) of Section Thirty-four (34); West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$) of Section 35, Township 10 North, Range 19 West, M.P.M. [2]

III.

That on the 2nd day of May, 1953, plaintiffs, as recited in Exhibit "A", paid to the defendants the sum of Five Thousand Dollars (\$5,000.00), which sum is the deposit and earnest money mentioned in said Exhibit "A". That the defendants still retain such amount. That the plaintiffs have made no other payments under said contract.

IV.

That on the 11th day of June, 1953, the defendants not having furnished an abstract of title for the real property described in the contract, Exhibit "A", the plaintiffs by letter requested of the defendants that such abstract be furnished. That thereafter and on June 18, 1953, the defendants furnished an abstract of title to the plaintiffs herein, who thereupon submitted the same to their attorneys for examination.

IV.

That the title to the real property as disclosed by said abstract was not merchantable in this: One Louis Boisot was at one time the owner of the real

property. Louis Boisot, so far as is disclosed by the abstract, never conveyed the land or his interest therein to the defendants herein or any of their predecessors in interest. The lands herein described were, subsequent to the ownership of Louis Boisot, sold for taxes, and later the title to the lands herein described was quieted by a court decree, but neither the tax title proceedings nor the quiet title proceedings named Louis Boisot as a party, and that the interest of Louis Boisot has never been divested of record.

V.

That the said abstract did not disclose that [3] the title to the said property was vested in the defendants but disclosed that the title to the property is vested in Bernhard Jannsen and Anna Jannsen. A copy of a contract furnished with the abstract but not as a part of it disclosed that the defendants' only rights in the property are their rights as buyers under a conditional sales contract.

VI.

That the said abstract did not disclose the property to be free of liens and encumbrances, except a mortgage to The Federal Land Bank and B. Jannsen, and on the contrary, disclosed, which is the fact, that the title to the said land is encumbered by the lien of a repayment contract between the Bitter Root Irrigation District and the United States in an undisclosed amount. Plaintiffs are informed and believe and therefore allege upon in-

formation and belief that the amount of such lien is approximately Forty Dollars (\$40.00) per acre on the irrigable acreage within the said irrigation district and that one hundred twenty-one (121) acres of the described lands are within the said irrigation district, making a total lien against the said lands in the sum of approximately Four Thousand Eight Hundred Forty Dollars (\$4,840.00).

VII.

That the plaintiffs caused the abstract of title so furnished to be examined by attorneys of their choice and that thereafter and on June 22, 1953, plaintiffs wrote to the defendants a letter which was duly mailed to the defendants on June 22, 1953, and received by the defendants on or about June 23, 1953. That said letter is attached hereto, marked Exhibit "B", and by this [4] reference made a part hereof.

VIII.

That the defendants did not respond to plaintiffs' letter of June 22, 1953, and thereafter and on July 27, 1953, plaintiffs wrote to the defendants a further letter, which letter was mailed to defendants on July 27, 1953, and received by them on or about July 28, 1953. A copy of said letter is attached hereto, marked Exhibit "C" and by this reference made a part hereof.

IX.

That on July 30, 1953, defendants replied to plaintiffs' letters of June 22, 1953, and July 27,

1953, by a letter, a copy of which is attached hereto marked Exhibit "D" and by this reference made a part hereof. That since said date of July 30, 1953, the plaintiffs have received no advice or information from the defendants relative to the contract, Exhibit "A", or to the title defects described herein and in Exhibit "B".

X.

That more than a reasonable time has elapsed since the title defects were pointed out to the defendants and that the defendants are obliged under their said contract to return the Five Thousand Dollars (\$5,000.00) to the plaintiffs herein. That although the plaintiffs have demanded the return of such \$5,000.00, the defendants have failed, neglected and refused to return it to plaintiffs' damage in the sum of \$5,000.00, together with interest thereon at the rate of six per cent (6%) per annum since the 3rd day of August, 1953.

XI.

That the defendants have at all times been in the full and peaceful possession of the lands described [5] in Exhibit "A" and have had and enjoyed all of the crops produced and harvested therefrom during the year 1953, and that the plaintiffs have never been in possession of said lands or any part thereof.

For a Second Cause of Action and in the Alternative, Plaintiffs Complain:

I.

Plaintiffs incorporate herein by reference all of the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XI of plaintiffs' first cause of action.

II.

Plaintiffs without in any wise admitting that they have failed to perform any of the obligations required to be performed by them under Exhibit "A", allege that they should be relieved of a forfeiture of the Five Thousand Dollars (\$5,000.00) earnest money paid to the plaintiffs, and as grounds for relief from the forfeiture allege: That they entered into Exhibit "A" in good faith, intending to purchase the property described therein. That as the time for the last payment to defendants approached and they had not received an abstract of title, they wrote to the defendants to secure the same; that upon being furnished such abstract plaintiffs thereupon delivered it to what they believed to be reputable attorneys for an opinion thereon. That on receiving their attorneys' opinion, plaintiffs transmitted the contents thereof to the defendants. That although more than three months have elapsed since such time, defendants have taken no position with respect to the asserted defects in the title and have neither denied the existence of the asserted defects nor indicated any [6] intention to cure them. That the plaintiffs who had intended to move from their residence in Canada to Ravalli County have been uncertain as to whether the contract could be per-

formed, whether they would be establishing a new home and business in Montana, or whether they would continue to reside in Canada and there make their living. That by reason of the complete lack of response from the defendants and being uncertain whether the contract, Exhibit "A", would be performed, plaintiffs finally decided to return to their homes in Canada and continue their business there. That if at this late date the defendants were to evidence some interest in the title to the said property and were able to demonstrate that they would be able to deliver title called for by the contract, Exhibit "A", the plaintiffs could only at great expense and inconvenience to themselves now perform because of the changes in conditions which have occurred since the date of Exhibit "A". That the plaintiffs, if they have defaulted in the performance of any obligations by them to be performed, have done so in good faith; that they have not been guilty of any grossly negligent, fraudulent or willful breach of duty and are entitled to be relieved of any forfeiture on their part pursuant to the laws of Montana in that case made and provided.

Wherefore, plaintiffs pray for judgment,

1. In the amount of Five Thousand Dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from August 3, 1953, or in the alternative,

2. That the Court relieve the plaintiffs from [7] a forfeiture of the Five Thousand Dollars (\$5,-

000.00) earnest money paid on account of Exhibit "A" upon such terms and conditions as seem just to the Court sitting as a Court of Equity, and that judgment granting such relief be entered by the Court.

/s/ RUSSELL E. SMITH,
Attorney Preparing this Complaint

/s/ SMITH, BOONE & RIMEL,
Attorneys for Plaintiffs

PATENTED - ROGER BUSINESS FORMS, INC. - SAN FRANCISCO, CALIF.

EXHIBIT "A"

FORM No. 748
Copyright, 1949
Stevens Nease Law Publishing Co.
Portland, Ore.

RECEIPT AND AGREEMENT TO SELL AND PURCHASE

OFFICIAL FORM OF THE MONTANA
ASSOCIATION OF REALTORS

Stevensville, Montana, May 2, 1953

RECEIVED FROM ALFRED CLERMONT
sum of FIVE THOUSAND - - - - - Dollars (\$ 5,000.00)

as a deposit and earnest money in payment of the purchase price of the following described real property situated in _____ County of _____ State of Montana, to-wit: Jansen Farm consisting of 140 acres now owned by Glen Woodbury

All irrigation fixtures and equipment, plumbing and heating fixtures and equipment, including stoker and oil tanks, water heaters and burners, electric light fixtures (excluding bulbs), bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and all other fixtures attached thereto, except none to be left upon the premises as a part of the property purchased. The following personal property is also to be left upon the premises as a part of the property purchased: none

It is hereby agreed that the total purchase price is the sum of THIRTY SIX THOUSAND - - - - - Dollars (\$ 36,000.00)
payable as follows: The earnest money hereinabove received for in the sum of FIVE THOUSAND - - - - - Dollars (\$ 5,000.00)
and the balance of the purchase price in the sum of THIRTY ONE THOUSAND - - - - - Dollars (\$ 31,000.00)

to be paid as follows: (If on contract, state terms generally and if escrow, also name of escrow holder)
Payable in full to Mr. Woodbury less about \$20,000.00 mortgage to Bernhard Janssen and the Federal Land Bank, Janssen mortgage about \$16,500.00 and \$3,500.00 Federal Land Bank, Mortgage to Janssen payable \$1,000.00 a year at 3% and Federal Land Bank \$140.00 twice a year. Balance to Woodbury June 15, 1953.

1. It is further agreed: Seller shall at his expense furnish Purchaser an Abstract of Title continued to a date subsequent hereto showing merchantable title to above described property vested in Seller, or in lieu thereof, at Seller's option, a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except Mortgage to B. Janssen \$16,200.00 and Federal Land Bank, \$3563.98

2. The real property is to be conveyed by approved contract for Deed and the personal property by Bill of Sale, free and clear of all encumbrances except building and zoning ordinances and regulations, building and use restrictions, rights of way and easements, reservations in Federal and State deeds and those enumerated in Section 1 above.

3. Seller shall pay all of the taxes and assessments for 12/12ths of 1953 and prior years and Purchaser shall pay all taxes and assessments thereafter, including insurance and interest on mortgage or contract indebtedness shall be pro-rated as of May 4, 1953 and shall not be subject to revocation. I/we hereby acknowledge receipt of a copy of this Receipt and Agreement to Sell and Purchase, bearing the Agent's and my/our signatures.

4. If Seller does not approve this sale within 10 days hereafter, or if Seller's title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing statement of defects is delivered to Seller, then said earnest money herein recited for shall be returned to the Purchaser and all rights of Purchaser terminated unless Purchaser waives said defects and elects to purchase; but if said sale is approved by the Seller and Seller's title is merchantable or insurable and Purchaser neglects or refuses to complete the purchase or shall fail to pay the balance of the purchase price as hereinabove recited, then said earnest money shall be forfeited to the Seller as liquidated damages and not as a penalty and this Agreement thereupon shall be of no further force and effect.

5. Possession shall be delivered Purchaser on or before the _____ day of _____, 19____.

6. Purchaser enters into this Agreement in full reliance upon his independent investigation and judgment and there are no verbal or other agreements which modify or affect this Agreement.

7. Time is of the essence of this Agreement. Purchaser's rights herein are not assignable without the written consent of the Seller.

8. Special provisions: Purchaser is to get 1/2 of hay - 1/3 of grain - 1/3 of the peas. Purchaser is to pay taxes (water) for 1953.

Agent, By _____ Agents for _____ Seller _____

I hereby agree to purchase the above described property and pay the price of Thirty Six Thousand - - - - - Dollars (\$ 36,000.00) as set forth above and grant to said agent _____ days hereafter to secure Seller's acceptance hereof, during which period my said agent shall not be subject to revocation. I/we hereby acknowledge receipt of a copy of this Receipt and Agreement to Sell and Purchase, bearing the Agent's and my/our signatures.
/s/ Alfred Clermont
/s/ Marguerite I. Clermont

For valuable consideration I/we agree to sell and convey to the above described party the terms and conditions hereinabove stated and agree to pay to the above named agent a commission amounting to \$1,800.00 Five per cent of the above mentioned selling price for services rendered in connection with the sale of the above property. In the event of a forfeiture of the deposit as above provided, the said commission shall be paid to or retained by the agent to the extent of the agreed upon commission with residue to the seller. I/we authorize said agent to pay out of the cash proceeds of sale the expense of furnishing evidence of title, of recording fees and of any stamps, if any, as well as any incumbrances on said premises payable by me at or before closing. I/we acknowledge receipt of a copy of this Receipt and Agreement bearing my/our signature and that of the Purchaser named above.
Witness this 2 day of May, 1953.
/s/ Glenn Woodbury
/s/ Pearl Woodbury

(If husband and wife both must sign.)
Seller _____

EXHIBIT "B"

Huson, Montana, June 22, 1953

Mr. Glenn Woodbury and Pearl Woodbury,
Three Mile District, Stevensville, Montana.

Dear Mr. and Mrs. Woodbury:

With regard to the Receipt and Agreement to Sell and Purchase, entered into on May 2, 1953, between you as Sellers and us as Purchasers, an abstract of title to the property described in the agreement, was delivered to our attorneys on June 18, 1953, together with a certified copy of a contract for the sale of the property by Bernhard Jannsen and wife to you bearing date April 24, 1952.

Please consider this letter as a written notice advising you of, and containing a statement of defects, in the title. The following constitutes a statement of defects:

1. In the first place title to this property is not vested in you but rather record title is in the names of Bernhard Jannsen and Anna Jannsen, husband and wife. In this connection the Receipt and Agreement to Sell and Purchase contemplates a sale from you to us subject to a mortgage in favor of B. Jannsen and subject to a mortgage in favor of the Federal Land Bank. It does not contemplate our taking an assignment of your contract with the Jannsens. We therefore demand that you obtain title to the property to the end that the provisions of the agreement can be complied with.

2. Our attorneys advise us that the property is subject to a lien in favor of the United States of

America arising out of a contract with Bitter Root Irrigation District dated September 16, 1948 recorded June 11, 1949 in Volume 13 of Misc. page 91; the premises are included within the Bitter Root Irrigation District and as such the lands are subject to said contract lien. Demand is therefore made upon you to remove this lien as the title is not merchantable with the lien existing.

3. Our attorneys also advise us that there is a break in the title arising under the following circumstances:

While this property was owned by Bitter Root Valley Irrigation Company a Trust Deed was Executed in favor of First Trust and Savings Bank, an Illinois corporation, and Emile K. Boisot, Trustee. Subsequently the Irrigation Company was adjudged a bankrupt and suit was filed by the grantees of the trust deed; thereafter the property was sold by a Special Master appointed by the Federal Court to Louis Boisot. The property was not specifically described in this Special Master Deed, but in our opinion comes within the provision "All other property real and personal of every kind and description whatsoever owned by the Bitter Root Valley Irrigation Company, or its Trustee in bankruptcy, or in which it or he has any interest." We are unable to find any deed to this property from Louis Boisot.

We demand that in some appropriate manner, Louis Boisot and wife, if married, be legally divested of their interest in this property.

The Receipt and Agreement to Sell and Purchase provides that you shall have a reasonable time within

which to make the title to this property merchantable and we are accordingly allowing you a reasonable time within which to do so. Would you kindly advise us as to what you believe to be a reasonable time and also your decision as to whether you will remedy the defects noted in this letter within a reasonable time so as to provide us with a merchantable title subject only to the exceptions noted in the agreement.

If you fail to correct these defects and fail to make your title merchantable within a reasonable time a written demand will be made upon you for the return of the earnest money, namely \$5,000.00 paid by us on the execution of the agreement.

We are returning herewith to you the certified copy of contract of sale and our attorneys advise us that they are returning by **registered mail** the abstract of title as you requested, to the Federal Land Bank, c/o Dan Geiman, Hamilton, Montana.

Yours very truly,

/s/ ALFRED CLERMONT

/s/ MARGUERITE I. CLERMONT

EXHIBIT "C"

Huson, Montana, July 27, 1953

Mr. Glenn Woodbury and Pearl Woodbury,
Three Mile District, Stevensville, Montana.

Dear Mr. and Mrs. Woodbury:

Under date of June 22, 1953 we advised you by letter of the defects which our attorneys found in the title to your property and demanded that the title be made merchantable. In that letter we requested that you advise us as to what you believe to be a reasonable time for the correction of those defects and also whether you in fact intend to remedy the defects.

More than a month has elapsed since our letter and we have had no response from you. Your failure to reply is certainly indicative that you do not intend to make this title merchantable.

Unless we are advised by you within one week after you receive this letter that you intend to take steps to correct the defects, and when you will have the title merchantable as provided in the agreement, we will proceed on the basis that the provision of the agreement that "the said earnest money herein receipted for shall be returned to the purchaser on demand" is applicable. In the event that you do not intend to make the title merchantable, then please consider this letter as our demand upon you to im-

mediately return to us the earnest money receipted for namely, \$5,000.00 and your failure so to do will require our filing an action against you.

Yours very truly,

/s/ ALFRED CLERMONT

/s/ MARGUERITE I. CLERMONT

EXHIBIT "D"

Three Mile District, Stevensville, Montana

July 30, 1953

Mr. Alfred Clermont and
Mrs. Marguerite I. Clermont
Huson, Montana.

Dear Mr. and Mrs. Clermont:

We received your two letters of June 22 and July 27 regarding our May 2, 1953 contract for the sale and purchase of the Bernhard Jannsen farm. We have turned the matter over to our attorneys and they are checking over the objections which you have made. We expect to hear from them very shortly and get their advice on the statement of defects in title. You may be assured that the matter is being promptly taken care of and that we will act on the advice of our attorneys in the matter of clearing up any defects in merchantability of title.

Very truly yours,

/s/ GLENN WOODBURY

/s/ PEARL WOODBURY

[Endorsed]: Filed October 7, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendants move the Court to dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

/s/ LEIF ERICKSON,

Attorneys for Defendants [14]

Affidavit of Service by Mail attached. [15]

[Endorsed]: Filed November 2, 1953.

[Title of District Court and Cause.]

ORDER

The defendants' motion to dismiss having come on for hearing before the Court on the 3rd day of February, 1954, and the matter having been fully argued and submitted to the Court, and the Court having considered all of the arguments, and the briefs submitted, and being fully advised in the premises,

It Is Therefore Ordered that the defendants' motion to dismiss be and the same hereby is denied, and the defendant is granted 20 days within which to further plead.

It Is Further Ordered that the Clerk of this court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 10th day of March, 1954.

/s/ W. D. MURRAY,

U. S. District Judge [16]

[Endorsed]: Filed March 10, 1954.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Answer to First Cause of Action

As and for their answer to the first cause of action of the complaint herein, defendants allege as follows:

First Defense

The first cause of action of the complaint fails to state a claim against defendants upon which relief can be granted;

Second Defense

Admit the allegations contained in paragraphs I, II, III and IV; deny the allegations of the paragraph numbered IV beginning at line 17 through line 31 of page 2 of said complaint;

Answering paragraph V, defendants admit that title to the property is vested in Bernhard Jannsen and Anna Jannsen;

Answering paragraph VI, admit that the irrigated portion of the lands is included in the Bitter

Root Irrigation District, and that in common with all of the lands so included in said District is subject to the lien provided in a certain Repayment Contract between the Bitter Root Irrigation District and the United States; deny the other allegations of paragraph VI;

Answering paragraph VII, admit the allegations of said paragraph;

Answering paragraph VIII, admit the receipt of the letter marked Exhibit "C" and deny the other allegations of the said [17] paragraph;

Answering paragraph IX, admit the receipt by the plaintiffs of the letter, Exhibit "D", deny the other allegations of said paragraph;

Answering paragraph X, admit the defendants have refused to pay to the plaintiffs the Five Thousand Dollars (\$5,000.00) referred to and deny the other allegations of said paragraph;

Answering paragraph XI admit the allegations of said paragraph;

Allege that the plaintiffs, when the contract Exhibit "A" was entered into made specific inquiry concerning the lien of the Bitter Root Irrigation District and the United States on the lands here involved and entered into the said contract with full knowledge of the existence of the said lien and waived any right to object to the marketability of the title by reason of the existence of the said lien;

Allege that when the plaintiffs entered into the contract, Exhibit "A", the plaintiffs knew that legal title to the property was vested in Bernhard Jannsen and Anna Jannsen, and that the said Bernhard

Jannsen and Anna Jannsen did not hold a mortgage on the lands involved; that the plaintiffs specifically agreed with the defendants to assume the obligations of the defendants under the Contract for Deed referred to in paragraph V of the complaint and waived any right to complain of the marketability of the title by reason of the fact that legal title was, and is, vested in Bernhard Jannsen and Anna Jannsen and not in the defendant;

That the abstract furnished by the defendants shows a marketable title in the defendants, and the title of the defendants is, in fact, a marketable one within the provisions of the agreement between these plaintiffs and these defendants;

Except as herein specifically admitted, denied or alleged, defendants deny each and every other allegation contained in the [18] first cause of action in the complaint;

Third Defense

Allege that at all times defendants have been ready, willing and able to perform their obligations under the terms of the contract, Exhibit "A" and the agreements made with the plaintiffs referred to in the second defense, but that within a few days after the said contract was made, the plaintiffs determined not to fulfill their obligations under the said contract and agreement and so notified the defendants, and that since said determination by the plaintiffs, the plaintiffs have not been ready, willing or able to carry out their promises under the said contract and agreements;

That more particularly by said contract, Exhibit "A" to the complaint, the plaintiffs agreed to pay to the defendants the balance of the purchase price on June 15, 1953; that on said date the plaintiffs failed to tender to the defendants the said balance of the purchase price; that they were not then, nor have they since been ready, willing or able to perform the conditions of the said contract on their part to be performed; that under the contract time is made of the essence of agreement;

Fourth Defense

That if the plaintiffs did not waive the right to object to the marketability of the title by reason of the lien of the Bitter Root Irrigation District and the United States and by reason of the fact that legal title is vested in Bernhard Jannsen and Anna Jannsen, the defendants had no obligation to show a marketable title until such time as legal title was to pass to the plaintiffs; that under the contract, conveyance of the property to the plaintiffs was to be by contract for deed; that by such provision in the contract it was contemplated by the parties that defendants would fully comply with the contract if, at the time the plaintiffs had paid the payments to the Federal [19] Land Bank and to Bernhard Jannsen and Anna Jannsen, defendants could then deliver to the plaintiffs marketable title; that upon the payment of the several sums agreed to be paid by the plaintiffs under the said contract, full, legal title will vest in the plaintiffs and defendants will

have fully complied with all the provisions of the contract relating to the title conveyed;

Fifth Defense

That at all times defendants have been ready, willing and able to perform their obligations under the terms of the contract, Exhibit "A" and the agreements made with the plaintiffs referred to in the second defense; that defendants will be able to deliver good, merchantable title to the plaintiffs upon the completion of the payments to be made by the plaintiffs under the contract; that plaintiffs have full knowledge of this fact and plaintiffs had full knowledge of the state of the title at the time the contract was entered into and waived any right to object to the marketability of the title so far as the lien of the Bitter Root Irrigation District and United States and insofar as the title of Bernhard Jannsen and Anna Jannsen are concerned; that their objections to the title are not made in good faith but are made for the fraudulent purpose of relieving themselves of their obligations under the contract and for the purpose of unlawfully recovering the part payment made to these defendants;

Answer to Second Cause of Action

As and for their answer to the second cause of action of the complaint herein, defendants allege as follows: defendants incorporate herein by reference all of the allegations of the first, second, third and fourth defenses to the first cause of action, and in

addition, deny and allege as follows: As to paragraph II of the second cause of action, allege that plaintiffs have failed to perform their obligations required under the contract, Exhibit "A"; admit that the plaintiffs entered into [20] the contract Exhibit "A" in good faith intending to purchase the property described therein; allege that within a week after the execution of the contract Exhibit "A" plaintiffs determined that they were not going to perform the obligations devolving upon them by reason of the said contract; allege that plaintiffs defaulted in the performance of their obligation under the contract and deny that such default was in good faith; allege that said defaults in the performance of the obligation of the contract by the plaintiff, were grossly negligent, fraudulent and a willful breach of duty; and deny that plaintiffs are entitled to return of the down payment of Five Thousand Dollars (\$5,000.00) as a relief from forfeiture or otherwise.

In further answer to the allegations of paragraph II of the second cause of action, defendants say that the demand of the plaintiffs for an abstract was not made in good faith; that prior to the execution of the agreement, Exhibit "A", plaintiffs had full knowledge of the existence of the lien of the Bitter Root Irrigation District and of the fact that legal title was vested in Bernhard Jannsen and Anna Jannsen, his wife; that by the contract, Exhibit "A", the plaintiffs specifically assumed the obligations of the defendants under the contract for deed with Bernhard Jannsen and Anna Jannsen,

and that plaintiffs specifically waived any right to object to the marketability of the title to the lands by reason of the lien of the Irrigation District; that the objections of the plaintiffs to the marketability of the title after the examination of the abstract were made in bad faith and with the fraudulent purpose and intent to relieve themselves of their obligations under the said contract; except as herein specifically denied, admitted and alleged, defendants deny all of the allegations of paragraph II of said second cause of action.

For further separate defense to the second cause of action [21] defendants incorporate herein by reference all of the above allegations and denials contained above in the answer to the second cause of action, and in addition, allege that by reason of the failure of the plaintiffs to perform their obligations under the contract, Exhibit "A" to the complaint, the defendants have been damaged in an amount in excess of Five Thousand Dollars (\$5,000.00), and that it would be unjust and inequitable to permit these plaintiffs to recover any part of the Five Thousand Dollars (\$5,000.00) paid by the plaintiffs as the down payment and as a part of the purchase price for the lands involved.

Cross-Complaint

For a cross-complaint, defendants allege:

I.

That the plaintiffs are citizens of the Dominion of Canada; that the defendants are citizens of the

State of Montana; that the amount in controversy herein exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interests and costs;

II.

That on or about the 2nd day of May, 1953, the plaintiffs and the defendants entered into a written contract, a copy of which is attached to the complaint, marked Exhibit "A" and by this reference made a part of this cross-complaint; that the Jannsen farm referred to in said contract consists of the following described tracts of land, to-wit:

The North Half of the Northeast Quarter of the Southeast Quarter ($N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$) of Section 34, the West half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$), the Northwest Quarter of the Southwest Quarter of ($NW\frac{1}{4}SW\frac{1}{4}$) of Section 35, Township 10 North Range 19 West of the Montana Principal Meridian.

that on the said 2nd day of May the plaintiffs paid to the defendants the sum of Five Thousand Dollars (\$5,000.00) as a deposit, earnest money and in part payment of the purchase price of the property described and that the plaintiffs have made no [22] other payments under said contract;

III.

That at the time the said contract was made, plaintiffs were aware of the existence of a lien for the construction charges for irrigation structures under a certain contract between the United States of America and the Bitter Root Irrigation District

and entered into the contract for the purchase of the said lands with the understanding and agreement on the part of the plaintiffs that they would assume and pay the said lien when and if it became due, and that plaintiffs waived any right to object to the marketability of the title tendered by the defendants by reason of the existence of the said lien;

IV.

That at the time the contract for the purchase of the lands involved was entered into these plaintiffs knew that legal title to the said property was vested in Bernhard Jannsen and Anna Jannsen and that the defendants held the property under a certain contract for deed, and plaintiffs, by the contract, specifically assumed the obligations of the defendants under the said contract for deed, the said contract for deed being erroneously described in said contract as a mortgage and the plaintiffs specifically waived any right to object to the marketability of the title tendered by the plaintiffs by reason of the fact that the legal title was vested in Bernhard Jannsen and Anna Jannsen;

That under the contract, the land was to be conveyed to the plaintiffs by contract for deed and that upon payment by the plaintiffs of the amounts remaining due to Bernhard Jannsen and Anna Jannsen, title was to vest in the plaintiffs and not until then.

V.

That pursuant to the demand of the plaintiffs, defendants furnished an abstract of title to the

plaintiffs on June 18, 1953; [23] that except for the lien of the Irrigation District, repayment charges referred to above and except for the fact that legal title vests in Bernhard Jannsen and Anna Jannsen, both of which defects, if such they be, were known to the plaintiffs at the time they entered into the contract, as set out above and both of which defects plaintiff acquiesced in and accepted the abstract furnished by the defendants showed marketable title to the real property herein involved within the terms of the contract Exhibit "A" to the complaint and the title to the said lands was marketable on June 15, 1953 and is now marketable within the provisions of the contract, Exhibit "A" to the complaint;

VI.

That defendants have made repeated demands on the plaintiffs that they performed their obligations under the said contract and that they pay to the defendants the balance due under said contract;

VII.

That the defendants were, and have always been, and still are ready, willing and able to perform the agreement on their part;

VIII.

That should the plaintiffs be unable to carry out the terms of the contract and to perform their obligations thereunder and to make the several payments therein specified, the defendants will be damaged in the sum of Five Thousand Dollars (\$5,000.00); that the defendants relying upon the per-

formance of the contract by the plaintiffs refused other offers to sell the said lands to other persons; that the market value of the real estate has gone down since the date of the contract; that the defendants have suffered losses in the farming operations on the said property by reason of the uncertain status of the contract and in the event of the plaintiffs being unable to [24] carry out the terms of this contract, the defendants will be damaged in the above mentioned sum of Five Thousand Dollars (\$5,000.00);

Wherefore, defendants pray judgment:

I.

That the plaintiffs' complaint be dismissed with cost;

II.

That plaintiffs be required to perform said agreement and to pay to the Federal Land Bank and to Bernhard Jannsen and Anna Jannsen the amounts required to be paid by them under the said contract and in the manner provided in said contract, and to pay to the defendants the balance of Eleven Thousand Dollars (\$11,000.00) due on June 15, 1953, with interest on said several sums together with defendants' cost and for such other and further relief as to the court may seem just.

Dated this 29th day of March, 1954.

/s/ LEIF ERICKSON,

Attorney for Defendants [25]

[Endorsed]: Filed March 29, 1954.

[Title of District Court and Cause.]

REPLY AND ANSWER TO CROSS- COMPLAINT

Come now the plaintiffs and for reply to the defendants' cross-complaint on file herein, admit, deny and allege as follows:

I.

Admit the allegations of Paragraphs I and II of said cross-complaint.

II.

Deny the allegations of Paragraphs III and IV of said cross-complaint.

III.

With respect to the allegations of Paragraph V of said cross-complaint, admit that pursuant to the demand of the plaintiffs, defendants furnished an abstract of title to the plaintiffs on June 18, 1953. Deny the remaining allegations of Paragraph V of said cross-complaint.

IV.

Deny the allegations of Paragraphs VI, VII and VIII of said cross-complaint.

Wherefore, having fully replied to defendants' cross-complaint, plaintiffs pray for the relief demanded in the complaint.

/s/ RUSSELL E. SMITH,

Attorney Preparing this Reply

/s/ SMITH, BOONE & RIMEL,

Attorneys for Plaintiffs

[26]

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 6, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court, sitting without a jury, on the 29th and 30th days of November, 1954; the plaintiffs were represented by their counsel Messrs. Smith, Boone & Rimel, and the defendants were represented by their counsel Leif Erickson, Esq.; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the Court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the Court for its consideration and decision, and the Court having considered all the evidence and testimony submitted at the trial and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its

Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That the plaintiffs are citizens of the Dominion of Canada. That the defendants are citizens of the State of Montana. That the amount in controversy herein exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

II.

That on May 2, 1953, plaintiffs and defendants entered into a written contract providing for the sale by defendants and [28] purchase by plaintiffs of the following real property situated in Ravalli County, Montana:

The North Half of the Northeast Quarter of the Southeast Quarter ($N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$) of Section Thirty-four (34); West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$) of Section 35, Township 10 North, Range 19 West, M.P.M.

III.

That on May 2, 1953, plaintiffs paid to defendants the sum of Five Thousand Dollars (\$5,000.00) as a deposit and earnest money in part payment upon the agreed purchase price for said real property. That defendants still retain said amount. That plaintiffs have made no other payments under said contract.

IV.

That said contract of sale was prepared by Pat Hagarty, a real estate agent engaged by and acting for and on behalf of defendants, and that said contract, among other things, provided:

"1. It is further agreed: Seller shall at his expense furnish Purchaser an Abstract of Title continued to a date subsequent hereto showing merchantable title to the above described property vested in Seller, or in lieu thereof, at Seller's option, a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except mortgage to B. Jannsen \$16,-200.00 and Federal Land Bank, \$3563.98.

* * * * *

4. * * * if Seller's title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing statement of defects is delivered to Seller, then said earnest money herein receipted for shall be returned to the Purchaser on demand and all rights of Purchaser terminated unless Purchaser waives said defects and elects to purchase; * * * "

V.

That no abstract of title was furnished by defendants to plaintiffs before June 11, 1953, on which date plaintiffs wrote to Glenn Woodbury, one of the defendants, requesting that an abstract of title be delivered to plaintiffs or their attorneys. That this abstract of title was delivered on June 18, 1953 to plaintiff's attorneys and that by letter of

June 22, 1953, addressed to defendants, plaintiffs specified certain defects in the title, including: [29] (1) The fact that title to the property was not vested in defendants but rather was vested in Bernhard Jannsen and Anna Jannsen, husband and wife; (2) that the real property was subject to the lien in favor of the United States of America arising out of a contract with the Bitter Root Irrigation District; (3) That, although not shown by the abstract of title, there was a contract of sale from Bernhard Jannsen and Anna Jannsen, husband and wife, to defendants rather than title in the defendants, subject only to a second mortgage in favor of Jannsen and wife.

VI.

That defendants received said letter of June 22, 1953, by which plaintiffs specified certain defects of title and that defendants did not thereafter remedy said defects or communicate with plaintiffs in connection therewith other than to advise plaintiffs by letter of July 30, 1953, that the defects were receiving the attention of defendants' attorneys and that the matter would be promptly taken care of.

VII.

That the abstract of title furnished by defendants to plaintiffs' attorneys on June 18, 1953, bore a final certificate of date June 15, 1953, and that said abstract did not show merchantable title in defendants to the real property which was the subject of said contract of sale and that said abstract

disclosed that record title to said real property was actually vested in Bernhard Jannsen and Anna Jannsen, husband and wife, rather than in defendants and also showed that the property was subject to the lien of the United States of America arising out of a contract with the Bitter Root Irrigation District dated September 16, 1948, and recorded in the Office of the Clerk and Recorder of Ravalli County, Montana, on June 11, 1949 in Volume 13 of Misc., Page 91. That these defects were material, were not excepted in the contract of sale, and rendered the title unmerchantable. [30]

VIII.

That plaintiffs as purchasers have not waived said title defects nor elected to purchase said property notwithstanding said title defects, and that the defendants have failed to remedy said title defects within a reasonable time after receiving written notice thereof through plaintiffs' letter of date June 22, 1953. That plaintiffs made demand upon defendants for return of the \$5,000.00 earnest money paid by plaintiffs under the terms and provisions of said contract of sale, and defendants have failed and refused to return said earnest money.

IX.

That the plaintiffs never received possession of the real property which was the subject of the contract of sale, and that defendants retained possession and also enjoyed the use, rents and profits thereof. That in their relationships with defendants

under said contract of sale, plaintiffs acted promptly and in good faith and were not guilty of grossly negligent, willful or fraudulent breach of duty.

From the foregoing Findings of Fact the Court draws the following

Conclusions of Law

I.

That the Court has jurisdiction hereof.

II.

That defendants were obligated under the contract of May 2, 1953, to furnish plaintiffs an abstract or title insurance policy disclosing merchantable title in defendants to the real property which was the subject of said contract of sale, and that plaintiffs did not become obligated to pay the balance due on the purchase price until said abstract or title insurance policy had been furnished and plaintiffs given a reasonable time to examine the same and then only if merchantable title was shown in defendants, subject only to the exceptions specified in the contract. [31]

III.

That an abstract of title having been furnished, and having been examined and the defects of title

specified to defendants within a reasonable time by the plaintiffs, the defendants thereupon became obligated under said contract to remedy said defects within a reasonable time, or, upon demand, to return the earnest money of \$5,000.00 to plaintiffs.

IV.

That the defects specified by plaintiffs and mentioned in Paragraph VII of the findings herein rendered defendants' title unmerchantable, and the defendants having failed to remedy said defects within a reasonable time, and plaintiffs having demanded the return of their earnest money of \$5,000.00, the plaintiffs are entitled to recover said sum of \$5,000.00 from defendants, together with interest thereon from and after the date of filing their complaint herein.

V.

That in their relationship with defendants under said contract of sale, plaintiffs have acted promptly and in good faith and were not guilty of grossly negligent, willful or fraudulent breach of duty. That plaintiffs have established their right to equitable relief under Section 17-102, R.C.M. 1947, providing for relief from forfeiture, but since plaintiffs were never in possession of the real property which was the subject of the contract of sale, this right to equitable relief is co-extensive with the legal right of plaintiffs as elsewhere recited in these conclusions of law, namely, for the recovery from defend-

ants of the sum of \$5,000.00, with interest thereon from the date of filing the complaint.

Let judgment be entered accordingly, and counsel for the plaintiff is hereby ordered to prepare, submit to counsel for defendants for approval as to form, and present to the Court for signature a form of judgment in accordance with these Findings.

Done and dated this 31st day of January, 1955.

/s/ W. D. MURRAY,

United States District Judge [32]

[Endorsed]: Filed January 31, 1955.

In the United States District Court for the District
of Montana, Missoula Division

No. 382

ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Plaintiffs,

vs.

GLENN WOODBURY AND PEARL WOOD-
BURY, Defendants.

JUDGMENT

This cause came on regularly for trial before the Court, sitting without a jury, on the 29th and 30th days of November, 1954; the plaintiffs were represented by their counsel, Messrs. Smith, Boone & Rimel, and the defendants were represented by their counsel, Leif Erickson, Esq.; thereupon oral and

documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the Court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the Court for its consideration and decision. Thereafter the Court, on the 31st day of January, 1955, made and entered its Findings of Fact and Conclusions of Law herein,

Now Therefore, pursuant to said Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed, and this does order, adjudge and decree, [33] that the plaintiffs have and recover judgment, and that judgment is hereby entered for the plaintiffs, and against the defendants, in the amount of Five Thousand Dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the 7th day of October, 1953, and plaintiffs' costs herein, to be taxed and settled as provided by law.

Done this 4th day of February, 1955.

/s/ W. D. MURRAY,

Judge

[34]

[Endorsed]: Filed and Entered Feb. 4, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the above named Court and to the Clerk thereof,
and to Alfred Clermont and Marguerite I. Clermont, Plaintiffs and Appellees, and to Messrs. Smith, Boone & Rimel, their Attorneys:

Notice is hereby given that Glenn Woodbury and Pearl Woodbury, defendants above named, hereby appeal to the Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 4th day of January, 1955.

Dated this 2nd day of March, 1955.

/s/ LEIF ERICKSON,

Attorney for Appellants [36]

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know all men by these presents, that we Glenn Woodbury and Pearl Woodbury, as principals, and Adam Felde and Fred T. Porch, as sureties, are held and firmly bound unto Alfred Clermont and Marguerite I. Clermont in the full and just sum of Six Thousand Dollars (\$6,000.00), to be paid to the said Alfred Clermont and Marguerite I. Clermont, their successors, executors, administrators or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Signed with our seals and dated this 12th day of February, 1955.

Whereas, on February 4th, 1955, in an action pending in the United States District Court for the District of Montana, Missoula Division, between Alfred Clermont and Marguerite I. Clermont, as plaintiffs, and Glenn Woodbury and Pearl Woodbury, as defendants, a judgment was rendered against the said defendants, and the said defendants having filed a notice of appeal from such judgment in the United States Court of Appeals for the Ninth Circuit;

Now the condition of this obligation is such that if the said defendants shall prosecute their appeal to effect and shall satisfy the judgment in full, together with costs, interest and [37] damages for delay, if any, the appeal is dismissed, or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages that the said Circuit Court of Appeals may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ GLENN WOODBURY,

/s/ PEARL WOODBURY,

/s/ ADAM FELDE,

/s/ FRED T. PORCH

[38]

Duly Verified.

[Endorsed]: Filed February 15, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

I.

The Court erred in refusing to dismiss the complaint for failure to state a claim upon which relief can be granted;

II.

The Court erred in entering judgment for the plaintiffs;

III.

The Court erred in refusing to dismiss the complaint for the reason that neither by the complaint nor the reply did the plaintiffs allege themselves to be ready, willing and able to perform under their contract nor did they allege tender;

IV.

The Court erred in entering judgment for the plaintiffs for the reasons that:

(1) Plaintiffs did not prove they were ready, willing or able to perform under the contract, nor did they approve tender;

(2) The plaintiffs were in default under their contract and defendants were not since defendants could only be placed in default by tender on the part of the plaintiffs or an offer to perform;

(3) Defendants were not required to show marketable title until there had been tender of performance by the plaintiffs;

(4) The Court, in making its findings of fact disregarded [281] the parol evidence explaining the imperfections and ambiguities in the contract;

(5) The defendants were only required to have good title at the time set for conveyance of the lands involved;

(6) The testimony shows without question that the plaintiffs knew, understood and agreed that the Jannsen contract was a contract for deed and not a mortgage, and they expressly agreed to assume the contract;

(7) The plaintiffs were fully informed and were put on notice of the existence of the lien for irrigation construction charges. If they were not, under the terms of the contract, their lien of the irrigation construction charges could have been paid out of the purchase money;

(8) The evidence established that defendants had suffered damage by reason of the failure of the plaintiffs to carry out their contract in excess of the down payment.

Dated this 12th day of May, 1955.

/s/ LEIF ERICKSON,

Attorney for Defendants-Appellants

[Endorsed]: Filed May 16, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 283 pages numbered consecutively from 1 to 283 inclusive as a full, true and correct transcript, consisting of the original following papers designated by the parties, to-wit: Complaint, Motion to Dismiss, Order Denying Motion to Dismiss, Answer and Cross-Complaint, Reply and Answer to Cross-Complaint, Findings of Fact and Conclusions of Law, Judgment, Notice of Appeal and Bond, the Transcript of Testimony, all Exhibits listed in numerical order except the Abstract, Statement of Points and Designation of Contents of Record on Appeal, required by the rule as the record on appeal in Case No. 382, Alfred Clermont and Marguerite I. Clermont vs. Glenn Woodbury and Pearl Woodbury, as appears from the original records and files of said District Court in my custody as such Clerk.

Witness my hand and the seal of said District

Court at Butte, Montana, this 27th day of May, 1955.

[Seal]

H. H. WALKER,

Clerk

/s/ By D. F. HOLLAND,

Deputy Clerk

In the United States District Court, District of
Montana, Missoula Division

No. 382

ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Plaintiffs,

vs.

GLENN WOODBURY and PEARL WOOD-
BURY, Defendants.

TRANSCRIPT OF PROCEEDINGS

The above cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury, at Missoula, Montana, on November 29, 1954. The plaintiffs were present in person and represented by their counsel, Messrs. William T. Boone and J. W. Rimel, of Missoula, Montana, and the defendants were present in person and represented by their counsel, Mr. Leif Erickson, Helena, Montana.

Thereupon, the following proceedings were had:

Court: Number 382, Clermont vs. Woodbury.

Mr. Boone: If your Honor please, may we have about a 10 minute recess before we start that action?

Court: Court will stand in recess until 25 minutes after 10.

(Ten-minute recess.) [41]

Mr. Erickson: May it please the Court, at the outset, I have advised counsel that in my prayer for relief in the cross complaint, I have misstated the balance that would be due as \$6,000.00, and that figure should be \$11,000.00——

The Court: Very well.

Mr. Erickson: ——because under the contract itself and everything that appears in the pleadings shows that would be the correct amount, so at this time I move to have the cross complaint amended to change that figure to \$11,000.00.

Court: Very well, the amendment is ordered.

Mr. Boone: Does your Honor desire an opening statement?

Court: I don't think so: I think that we covered it, didn't we? In reference to the motion to dismiss, we have covered the picture generally. I think you can proceed.

Mr. Boone: Very well. If your Honor please, at this time the plaintiffs offer in evidence what has been marked for identification as Exhibit 1, which is an abstract of title, No. 9209, to the lands described in the complaint, the same bearing Abstracter's Certificate of date June 14, 1953, 5:00 o'clock p.m. of the Ravalli County Abstract Company. In making this offer, your Honor, this ab-

abstract is held in escrow with the Federal Land Bank in Spokane, and has been withdrawn from escrow for the purposes of this case, and I would like to have it admitted with the understanding that at the conclusion of the trial and decision of the Court, the abstract may be withdrawn [42] for the purpose of being returned to the Federal Land Bank.

Mr. Erickson: That is agreeable.

Court: Very well.

(Plaintiff's Exhibit 1, being Abstract of Title No. 9209, covering lands involved, was here received in evidence, and will be certified to the Court of Appeals by the Clerk of this Court.)

ELSIE W. OLIVA

called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Will you state your name to the Court, please? Just sit down.

A. Elsie W. Oliva.

Q. Your residence, please?

A. Hamilton, Montana.

Q. And what position do you hold with the Bitterroot Irrigation District?

A. I am secretary.

Q. And as secretary, do you have in your possession the books and records and documents of the district? A. I do.

Mr. Boone: And it has been agreed between counsel, your Honor, that rather than take the time

(Testimony of Elsie W. Oliva.)

to have this witness [43] testify to various facts that it may be stipulated as to those facts as follows: First, that the number of irrigable acres within the Bitterroot Irrigation District is 16,665 acres; that of the lands described in the plaintiffs' complaint, 121 acres of those lands are within the Bitterroot Irrigation District; that prior to July 1, 1953, and during the month of June, 1953, the amount owing to the United States under the repayment contract pleaded in the plaintiffs' complaint was \$39.26 per acre for each acre under the District and subject to the repayment contract; that the amount owing to the United States on the lands described in the plaintiffs' complaint and subject to the repayment contract would then be 121 acres at \$39.26 per acre; that on July 1, 1953, the district made a payment to the United States of 89 cents per acre for each acre under the repayment contract, leaving a balance of construction charges due to the United States after July 1, 1953, of \$38.37 per acre, which would apply to the 121 acres within the lands described in the plaintiffs' complaint. Is that correct?

Mr. Erickson: I would like to add just one little variation in the stipulation. I don't anticipate we will be met with the problem on the lands at some later date as to the actual amount owing, for example with the District, but I would like to have the stipulation in the form that if this witness testified, she would testify her records show that. I [44] don't want to be in the position of admitting to the

(Testimony of Elsie W. Oliva.)

accuracy of that; that her records would show that figure.

Mr. Boone: Very well.

Court: Very well.

Mr. Boone: Now, if your Honor please, counsel has requested that while this witness is on the stand that there be offered and introduced in evidence, to which I have no objection, a copy of the repayment contract, which has been identified as the plaintiffs' Exhibit 2, but which should be introduced as a defendants' Exhibit. We have no objection.

Court: Are you now through with the witness?

Mr. Boone: Yes, I am through.

Mr. Erickson: I now offer proposed Exhibit 1 for the defendants, being the contract.

Court: Very well, it is admitted.

(Defendants' Exhibit 1, being copy of contract between United States and Bitterroot Irrigation District, dated September 16, 1948, was here received in evidence and will be certified to the Court of Appeals by the Clerk of this Court.)

[See pages 224-255.]

Mr. Boone: It may be stipulated that that is a true and correct copy of the contract with the exception of certain exhibits that were added to the original, and also to the execution, which we admit was properly executed.

Mr. Erickson: That is my understanding of what we have stipulated to.

(Testimony of Elsie W. Oliva.)

Court: Very well. [45]

Mr. Boone: That is all.

Cross Examination

By Mr. Erickson:

Mr. Erickson: So we may dispose of the witness, I wonder if I may ask a question or two which aren't properly cross examination, but I believe it would expedite the matter and we could release the witness?

Court: If there is no objection.

Mr. Boone: No objection.

Q. Does it occur that land is taken out of the district so it is no longer subject to the lien?

A. No, we have to get the permission of the Secretary of Interior.

Q. But I asked you does it happen?

A. It happens occasionally, yes.

Mr. Erickson: That is all.

Redirect Examination

Q. (By Mr. Boone): When was the last time it did happen, Mrs. Oliva? A. In 1948.

Q. I see; and the 121 acres which I have referred to are still within the district?

A. Yes, sir, they are. [46]

Q. In whose name are those?

A. Bernhard and Anna Jannsen, isn't that the name?

Mr. Boone: That is all.

(Testimony of Elsie W. Oliva.)

Recross Examination

Q. (By Mr. Erickson): May I refresh the witness' memory? Wasn't there a more recent case in which Mr. Shallenberger appeared as counsel where land was taken from the district?

A. Yes.

Q. Do you recall the approximate date of that?

A. Wouldn't that be 1952?

Q. That would be your recollection, about 1952?

A. Yes.

Mr. Erickson: That is all.

Mr. Boone: That is all.

Court: Step down, call the next witness.

(Witness excused.)

MARGUERITE IRENE CLERMONT

one of the plaintiffs, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Will you state your name, please?

A. Marguerite Irene Clermont.

Q. You are one of the plaintiffs in this action against Glenn Woodbury and Pearl Woodbury?

A. Yes, sir.

Q. Where do you live at the present time, Mrs. Clermont?

A. In Harrison Hot Springs, B. C.

Q. British Columbia? A. Canada, yes.

Q. And did you and your husband come to Mon-

(Testimony of Marguerite Irene Clermont.)

tana, then, for the purpose of the trial of this action? A. Yes, sir.

Q. I am handing you, Mrs. Clermont, an instrument which has been marked for identification as Plaintiffs' Exhibit 2, and I will ask you if you can identify the signatures on that? A. Yes.

Q. Are they signatures of you and your husband? A. Yes, they are.

Q. Was that a letter which was regularly mailed in the United States mail to Mr. Glenn Woodbury at Stevensville, Montana? A. Yes, sir.

Q. With postage prepaid? A. Yes.

Mr. Boone: We now offer in evidence Plaintiffs' Exhibit 2. [48]

Mr. Erickson: No objection.

Court: It is admitted.

PLAINTIFFS' EXHIBIT No. 2

"Huson, Montana, June 11, 1953

"Mr. Glenn Woodbury
(Three Mile District)
Stevensville, Montana.

"Dear Mr. Woodbury:

"With regard to the receipt and agreement to sell and purchase entered into on May 2, 1953, between you and Mrs. Woodbury, as Sellers, and us, as Purchasers, you are advised that we have not as yet been provided with an abstract of title to the ranch property described in the agreement.

"The agreement provides that the Seller shall at his own expense furnish the purchaser with an ab-

(Testimony of Marguerite Irene Clermont.)

abstract of title, continued to a date subsequent to the agreement, showing merchantable title to the farm property listed in the Seller, free and clear of all liens and encumbrances except the mortgage to Jannsen and Federal Land Bank.

"The agreement also calls for a payment to you from us on June 15, 1953.

"You can understand that we will not make the payment to you until the abstract is provided as the agreement calls for, and until an opportunity is had for our attorneys to examine the same to determine whether your title is merchantable.

"The attorneys whom we have selected to examine the abstract for us are Smith, Boone & Rimel, First National Bank Building, Missoula, Montana, and instead of sending the abstract to us, you may deliver it to the attorneys. We have advised them that the abstract will be forthcoming.

"Very truly yours,

/s/ Alfred Clermont

/s/ Marguerite I. Clermont." [49]

Mr. Boone: This is a letter which makes demand for the abstract. May I see the Court file?

Q. Mrs. Clermont, there was attached to your complaint in this action an exhibit which was designated as Exhibit No. "B", which was a letter signed by you and Mr. Clermont on June 22, 1953, to Mr. Glenn Woodbury. Will you please tell the Court whether you received any response to this letter of June 22nd, either by mail or telegram or oral com-

(Testimony of Marguerite Irene Clermont.)
munication at any time after sending it and prior to July 27, 1953?

A. No, we heard nothing.

Q. You heard nothing. Did you hear anything from Mrs. Woodbury with respect to that letter?

A. No, I didn't.

Q. Now, then, referring to the letter which is marked Exhibit "C" attached to the complaint, a letter signed by you and your husband to Mr. Woodbury and his wife, did you receive any communication from either Mr. or Mrs. Woodbury after sending this letter on July 27th, any communication of any kind, either by telegram, letter, or oral, before the receipt of the letter, Exhibit "D", after July 30, 1953?

A. No, we heard nothing.

Q. I see. Now, you did receive the letter which is attached to the complaint as Exhibit "D" from Mr. and Mrs. Woodbury, did you not?

A. Yes. [50]

Q. Now, after the receipt of that letter, was there any communication from either Mr. or Mrs. Woodbury, or both of them, or from any attorney representing them, concerning the matters which were the subject of these previous letters up until the time the complaint in this action was filed?

A. No, at no time.

Q. Did you receive any letter or telegram or oral communication whatsoever? A. No.

Q. Either from the Woodburys or from any attorneys representing them?

(Testimony of Marguerite Irene Clermont.)

A. No, never.

Q. The contract, which is attached to the complaint, Mrs. Clermont, as Exhibit "A", will you tell the Court by whom that contract was prepared?

A. By Mr. Hagarty.

Q. And who was he, please?

A. He was our real estate agent.

Q. Who was he representing?

A. Mr. and Mrs. Woodbury.

Q. Did you or Mr. Clermont employ him in any capacity?

A. We just went to see him to look over some property.

Q. He was representing Mr. and Mrs. Woodbury? A. Yes.

Q. And he prepared the contract? [51]

A. Yes.

Q. Exhibit "A"? A. Yes.

Q. Now, Mrs. Woodbury, or Mrs. Clermont, not having heard from either Mr. or Mrs. Woodbury after that letter of July 30th, which you received, what did you and Mr. Clermont do with respect to moving back to Canada?

A. After thinking it over and having heard nothing, no encouragement that this was going to be satisfied so we would be free and feel free to work this particular farm in which we were interested, we decided by that time, knowing more of the ways of living in Canada, and being more acquainted with their ways, we decided we should return to Canada to seek some way of making our living,

(Testimony of Marguerite Irene Clermont.)
and the school term was approaching and we had to get our children, of which we have five, into school, and we were waiting and waiting, and we waited until the 23rd of August to leave here, and crossed the lines on the 7th of September.

Q. Now, after this contract, Exhibit "A" was signed, did either you or Mr. Clermont have possession of the ranch properties involved in this proceeding?

A. No, we never worked the farm.

Q. And you had no assurance that the transaction was going to be closed?

Mr. Erickson: To which we must object——

Mr. Boone: Very well.

Q. Now, pending—or I should put it the usual way—waiting to hear from the Woodburys with respect to these title problems, will you please tell the Court whether or not you and your husband incurred any expense? A. Yes.

Mr. Erickson: To which we object on the ground it is not material and relevant.

Mr. Boone: It is pleaded, your Honor, under the second cause of action.

Court: Very well. Overruled.

A. Do I answer that now?

Court: Yes, you may answer.

A. Yes, we spent a great deal of money.

Q. Will you just relate generally to the Judge as to what inconvenience and expense you were put to?

Mr. Erickson: We will object on the further

(Testimony of Marguerite Irene Clermont.)

grounds there is no proper foundation, nothing to indicate that the expense was incurred by reason of anything connected with this lawsuit.

Court: Well, I think we will have to hear the evidence to find that out. You may proceed and answer.

A. Yes, we had to go to a great deal of expense. After all, we had parted with a good sum of money, and it took our cash balance down as, I should say so low that it was very difficult for us to find anything else. Property is high here and in [53] Canada; less in Canada, of course.

Mr. Erickson: I am now going to move to strike the testimony of the witness. It is not responsive.

Court: Yes. I think that your position is correct. If you will direct it more specifically.

Q. What I am inquiring about specifically, Mrs. Clermont, is the matter of inconvenience and expense you and your husband were put to during the period you were waiting for some response with respect to the title problems before you did go back to Canada.

A. Yes. We, in the meantime, were working for a farmer at Huson, Montana, and after all, we were not making what we figured we would have made if we had a property of our own, so we were just barely eking a living at the time, and also, we had a great medical expense at that time. We had to go back and forth to Stevensville several times. We were into Missoula several times, and that cost money, too.

(Testimony of Marguerite Irene Clermont.)

Mr. Erickson: At this time I move to strike that answer.

Court: I don't see its materiality.

Mr. Boone: All right, your honor.

Q. Now, at the time of returning to Canada in September, 1953, you made your residence there from that date to the present, did you?

A. Yes.

Q. Have you taken up any business or occupation during that [54] period of time?

A. Yes.

Q. What has been done in that respect, please?

A. So after we passed the lines, we secured a job near Vancouver, near Westminster, I should say, on a farm for a short while, and then started to look around to find something to make a living with with the few dollars we had left, so we found and bought the stock of a small grocery store, and that is now our livelihood.

Q. You are at the present time operating that store? A. Yes.

Q. Now, would you tell the Court whether your taking that grocery store, starting that livelihood was as a result of not having any action with respect to these statements of defects of title?

A. Yes, because we wanted a farm, we didn't want a grocery store, but that is the business that was easiest for us to get into, as buying a small stock of groceries isn't as expensive as buying a farm. It is not what we liked, it is what we were forced to.

(Testimony of Marguerite Irene Clermont.)

Q. Should, at any time in the future, the Woodburys announce that they were in a position to convey the title they had contracted to convey to you, would you tell the Court whether you could then assume that contract, or whether it would be at great inconvenience and expense to you? [55]

A. Yes, for more than one reason. First of all, you can't dispose of this property any time you desire. It will take time, and consequently, we will lose some money if we should try and hurry it; and again, we were immigrants to this country in the spring of 1953, and when we once applied for an immigration visa, I understand that after you return, like to Canada, you renounce your visa, and it will take a period of near five years before we may apply for a second visa, which is not guaranteed by the United States Government.

Mr. Erickson: I move to strike the evidence from where she says "she understands" with relation to the immigration.

Court: Well, I understand it too, so.

Mr. Erickson: Very well.

A. That is through talking to the Immigration Bureau.

Court: Witnesses are not permitted to tell us what the law is.

A. No, that is what they tell us.

Mr. Erickson: I am only saving my record on this, your Honor, because I realize that the Court is going to eliminate what is irrelevant, immaterial,

(Testimony of Marguerite Irene Clermont.)

or improper, but I don't want to be in the position of having it admitted by my silence.

Court: Yes, I think you are right and should call it to my attention, and in fact, that portion of the answer is stricken.

Q. At the time this contract was entered into, Mrs. Clermont, [56] you and your husband paid the Woodburys \$5,000.00? A. Yes.

Q. Has that \$5,000.00, or any portion of it, ever been returned to either one of you? A. No.

Mr. Boone: That is all.

Cross Examination

Q. (By Mr. Erickson): Mrs. Woodbury—Mrs. Clermont—I followed counsel—Mrs. Clermont, you were working on a farm at Huson, Montana, at the time negotiations started that resulted in this contract, were you not? A. Yes.

Q. You continued to work there until August 23, 1953, would you say? A. That's right.

Q. Now, in relation to the responses you may have gotten to the letters beginning with the letter of June 11th, who prepared the letter of June 11th?

A. Mr. Boone.

Q. And, as to the letter which is, I believe, the next letter, dated June 22nd, who prepared that letter? A. Mr. Boone.

Q. And who prepared the letter of July 27th?

A. Mr. Boone.

Q. So, that from June 11th and from there on,

(Testimony of Marguerite Irene Clermont.)

the matter was in the hands of your attorneys, was it not? A. It was.

Q. Do you know whether your attorneys ever got any response from Mr. Woodbury or anybody representing him? A. No.

Q. That is something outside of your knowledge?

A. They have never received anything that I know of that I have ever been told. We were in constant contact with him at all times.

Q. You don't know whether there were conferences between Mr. Boone and Mr. Claude Johnson.

A. I have never heard the name of Mr. Johnson.

Q. You don't know whether there were any conferences between the law firm of Boone, Smith and Rimel, and the law firm of Murphy, Garlington and Whitlock?

A. I have never heard of any.

Q. Now, you said that at the time you left here, by reason of the payment made to Mr. and Mrs. Woodbury, you didn't have very much money, is that true?

A. Not as much as we would have needed.

Q. How much money did you have?

A. At the time our wheat payments had come in. We had, I believe we crossed with close to \$12,000. [58]

Q. Did you have——

Mr. Boone: Just a minute, were you finished?

A. Yes.

(Testimony of Marguerite Irene Clermont.)

Q. Did you have that amount of money available on June 15, 1953?

A. We had more than that.

Q. Mrs. Clermont, you spoke of Mr. Hagarty, and I believe you testified it was through Mr. Hagarty you entered into negotiations to purchase this farm, is that true?

A. Yes, first of all, I should say we met a restaurant operator—I don't know his name——

Q. At Stevensville?

A. Yes, and we asked him for the name of a real estate man there in town, as we liked the country, and he referred us to Mr. Hagarty.

Q. Did you go then to see Mr. Hagarty?

A. Yes.

Q. Who all was in that party that went to see Mr. Hagarty at that time?

A. Just my husband and myself.

Q. And do you recall the approximate date?

Mr. Boone: Objected to, your Honor, as improper cross examination.

Court: Overruled.

A. I don't remember. [59]

Q. You don't recall the date?

A. No, it would be a few days before.

Q. The contract bears date May 2, 1953, and you would say it would be a short time before that?

A. Just a few days before, yes.

Q. Now, when you went to see Mr. Hagarty, did you have any conversation concerning this particular piece of property? A. Yes.

(Testimony of Marguerite Irene Clermont.)

Q. What was that conversation?

Mr. Boone: Objected to as improper cross examination.

Mr. Erickson: May it please the Court, I am somewhat puzzled myself as to the proper method of procedure. As I visualize this case, I think that is what it is going to turn on. We feel the contract itself is so indefinite and the terms so contradictory, and on general rules of marketability, we have considerable latitude in showing the Court the circumstances under which this contract was prepared.

Court: Yes, I think you examined with reference to whether or not Mr. Hagarty was representing her, and as to that you may proceed, and what the conversations were will disclose who he was representing; if he prepared the contract, who was to be bound by the more strict interpretation of the contract. I think that is all a matter for the Court to be advised upon.

Mr. Boone: Our direct examination did not cover any subject of negotiations between the parties. That was my point. [60]

Mr. Erickson: I believe if we proceed in a more orderly fashion—if he didn't examine Mrs. Clermont on that, I will not ask her any more questions about that at this time, and present my witnesses as to that feature because——

Court: Very well.

Mr. Erickson: Because we are willing to agree that Mr. Hagarty was representing the seller in the matter of the preparation of the contract.

(Testimony of Marguerite Irene Clermont.)

Q. Mrs. Clermont, do you know whether or not Mr. Woodbury offered a job to Mr. Clermont during the period between May 2nd and the time the contract was to be performed, or June 15th?

Mr. Boone: Objected to as improper cross examination.

Mr. Erickson: She has testified about having worked for low wages at something on a farm.

Witness: I beg your pardon, not low wages.

Court: I think it was all so indefinite that it didn't mean anything, to tell the truth.

Mr. Rimel: I believe it was stricken.

Mr. Erickson: I will withdraw the question. That is all, Mrs. Clermont.

(Witness excused.)

ALFRED CLERMONT

one of the plaintiffs, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Will you state your name to the Court, please?

A. Alfred Clermont.

Q. You may sit down. You are one of the plaintiffs in this action, the husband of the lady who just testified? A. Yes.

Q. You have to answer these questions, Mr. Clermont. Just sit down. You are the husband of the lady who just testified here? A. Yes.

Q. Now, referring for the moment, Mr. Cler-

(Testimony of Alfred Clermont.)

mont, to the letter of June 22, 1953, which is the Exhibit "B" to your complaint, signed by you and your wife, after that letter was written, did you receive any communication from either Mr. or Mrs. Woodbury, or anyone acting in their behalf, either by letter or by telephone, or by telegram, or any other way, before this letter of July 27, 1953?

A. No.

Q. Now, after the letter of July 27, 1953, which you and your wife signed to the Woodburys, the letter being Exhibit "C" to the complaint, did you receive any communication to that letter other than the letter of July 30, 1953, from Mr. or Mrs. Woodbury?

A. No. [62]

Q. That letter of July 30th is Exhibit "D" to the complaint. Did you receive any communication whatsoever from either Mr. or Mrs. Woodbury by letter, telegram, telephone conversation, or otherwise?

A. No.

Q. Now, after the letter of July 30, 1953, from Mr. and Mrs. Woodbury, did you receive any communication by letter, telegram, or otherwise, from Mr. or Mrs. Woodbury before you and your wife went back to Canada?

A. No.

Q. Now, this action, as I recall it, was filed in October. Will you tell the Court whether you received any communication from Mr. or Mrs. Woodbury, or anyone acting in their behalf, up until the time this action was filed?

A. No.

Q. Now, you have set up in your complaint that at the time the contract was signed with the Wood-

(Testimony of Alfred Clermont.)

burys, attached as Exhibit "A" to the complaint, you and your wife paid a \$5,000.00 deposit?

A. Yes.

Q. Have you ever gotten that deposit back from the Woodburys, or any part thereof, up to the present time? A. No.

Mr. Erickson: I am going to object to the question on this ground: only as to his designation of it as a deposit. The contract will speak what it is. [63]

Mr. Boone: Well, the payment, then.

Court: The objection is overruled. I can distinguish—I mean that is a question I am going to have to decide, and the use of the word is just in order to permit the flow of testimony. No significance will be given to the word as it is used by a witness in that regard.

Q. Have you received that money back, or any part of it? A. Not at all.

Mr. Boone: You may examine.

Cross Examination

Q. (By Mr. Erickson): Mr. Clermont, the \$5,000.00 that was paid, did you pay that all to Glenn Woodbury?

A. Now, if I remember right, I think Mr. Pat Hagarty had one check for \$1,000.00 and Mr. Woodbury \$4,000.00.

Q. And Mr. Pat Hagarty is the gentleman that has been identified here as a real estate agent, is that correct? A. Yes.

Q. Do you know how he happened to be paid the \$1,000.00? A. A check.

(Testimony of Alfred Clermont.)

Q. Why was he paid \$1,000.00?

Mr. Boone: Objected to as immaterial.

Court: Overruled.

A. Well, it is earnest money. [64]

Q. Do you know whether or not that was paid to Mr. Hagarty as the real estate man's commission?

A. I don't know just how he took it, but he took it, that is all I can say.

Q. There was no discussion that that was Mr. Hagarty's commission for arranging the sale?

A. No.

Q. You are sure about that?

A. Well, like I say, I just made him two checks.

Q. Now, you never were—were you ever in possession of the property?

A. No, I don't think I was.

Q. Were you ever offered possession by Mr. Woodbury?

Mr. Boone: That is objected to as improper cross examination.

Court: Sustained.

Q. Now, calling your attention to the letters to which you have testified, and you heard your wife testify, would your testimony be the same that those letters were prepared by Mr. Boone, the three letters, one of June 11th, and June 22nd and July 27th?

A. Yes.

Q. And do you know whether Mr. Boone or anyone else in his firm received any communications

(Testimony of Alfred Clermont.)

from Mr. Woodbury or Mrs. Woodbury after June 15th? [65]

A. Yes.

Q. What do you know about that, Mr. Clermont? A. Received?

Q. I meant by that do you know whether or not attorneys representing Mr. Woodbury, or Mr. Woodbury himself, discussed this matter with your attorneys after June 15th.

A. I don't think so.

Q. Do you know whether or not—that is all I am asking you is whether you know that the matter was discussed, the matter of the title and so forth, by Mr. Woodbury and Mr. Boone, or by people representing Mr. Woodbury? A. No, no.

Q. You know nothing about that. Did Mr. Boone or anyone from his firm advise you there were any negotiations taking place about the contract or about the title after June 15th? A. No.

Q. Had you ever heard the name Claude Johnson? A. No.

Q. Have you heard of the law firm in connection with this case of Murphy, Garlington and Pauly? A. No.

Q. Mr. Clermont, the letter of June 11th, can you tell us how that happened to be written? That is the letter, if you will remember, Mr. Clermont, and I think it is Exhibit 2, which is the letter you have already seen. Do you know how that [66] happened to be written?

Mr. Boone: That is objected to as improper cross

(Testimony of Alfred Clermont.)

examination, no questions were asked this witness with respect to that letter.

Court: Sustained.

Mr. Erickson: It was my understanding that Mr. Clermont testified he was a signer of the letter, and it was his letter, and that is the reason I felt I was entitled to ask questions as to how he happened to have that letter written; and it obviously appears to be his letter and was introduced on behalf of the plaintiffs.

Mr. Boone: I only questioned the witness with respect to the letters attached to the complaint.

Court: That is as I recall it.

Mr. Erickson: That is all I have.

Court: You may be excused. Call the next witness.

(Witness excused.)

Mr. Boone: The plaintiffs rest, your Honor.

Mr. Erickson: Call Glenn Woodbury.

GLENN WOODBURY

one of the defendants, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Your name is Glenn Woodbury? A. That's right.

Q. And you are one of the defendants and cross complainants in this action, is that true?

A. Yes.

(Testimony of Glenn Woodbury.)

Q. You reside in the Three Mile District near Stevensville? A. Yes.

Q. Mr. Woodbury, you own two ranches there, is that true? A. Yes.

Q. And one of them is your home ranch called the Porch Ranch, is that true? A. Yes.

Q. And that is a relatively larger ranch, is that true? A. That's right, yes.

Q. Now, the property here involved is spoken of as the Jannsen place, is that correct?

A. Yes.

Q. Where is that with relation to your home place?

A. Well, it corners with the home place, the part I live on. The northeast corner of the Jannsen place joins the southwest corner of the Porch place.

Q. And both of those places lay in a little valley, do they not? A. Yes, more or less.

Q. Is there a stream going through both places?

A. Yes.

Q. What is the name of that stream?

A. Well, Three Mile Creek is the main stream.

Q. How far is the Jannsen place from what is called the Big Ditch?

A. Oh, at the closest point, I suppose it would be between, some place between a quarter and half a mile.

Q. Can you see the Big Ditch from the Jannsen place? A. Very easily.

Q. And is it out of the Big Ditch that the Jannsen place is irrigated? A. Yes, it is.

(Testimony of Glenn Woodbury.)

Q. And I think the testimony is it is about 120 acres of irrigable land, is that true? A. 121.

Q. Now, you bought that property from a man by the name of Jannsen, is that correct?

A. Yes.

Q. Did you have a legal title to that property?

A. I thought I did.

Q. Well, I mean by that, under what kind of instrument do you hold that property?

A. A contract for deed.

Q. And did you furnish to Boone, Smith and Rimel a copy of the contract for deed at the time you furnished them with a copy [69] of the abstract? A. I did.

Q. And showing you that contract for deed, is this the original which you have in your possession that I am designating here? A. Yes.

Q. That is an original signed copy?

A. Yes.

Q. Now, the copy you furnished to Boone, Smith and Rimel has on it, in addition to what is on the original, a notation in fine type, "This is to certify that the attached is a true and correct copy" and so forth of the original, is that the one you furnished to them? A. Yes.

Q. Where did you secure that?

A. From Attorney Brown in Stevensville.

Q. Is he the gentleman that prepared the original? A. Yes.

Q. And by comparison, is this copy the same as the original?

(Testimony of Glenn Woodbury.)

A. Yes, I suppose it is; it is supposed to be. It is a certified copy. I didn't check it word for word.

Mr. Erickson: I now offer Defendants' Proposed Exhibit 2, which is the copy to which I have made reference.

Mr. Rimel: No objection.

Court: It is admitted. [70]

(Defendants' Exhibit 2, being copy of agreement dated April 24, 1953, between Bernhard and Anna Jannsen and Glenn A. and Pearl Woodbury, was here received in evidence, and will be certified to the Court of Appeals by the Clerk of this Court.)

[See pages 255-259.]

Q. Mr. Woodbury, are your payments under that contract paid up to date? A. They are.

Mr. Boone: Objected to as immaterial.

Court: Overruled.

Q. Now, you are acquainted with Mr. Clermont?

A. Yes.

Q. When did you first meet Mr. Clermont?

A. May 2, 1953.

Q. And where did you meet him?

A. On the Jannsen property.

Q. And whereabouts there?

A. Well, out in a pea field that I was planting to peas.

Q. Was anyone else present beside yourself and Mr. Clermont when you became acquainted?

A. Mr. Hagarty and a fellow by the name of Roy Marie, I believe.

(Testimony of Glenn Woodbury.)

Q. Was Mrs. Clermont present at that time?

A. Yes.

Q. And was there anyone else there?

A. Some of their children were with them. I wouldn't say whether they were all there or not.[71]

Q. Did you at that time have a conversation with Mr. Clermont? A. Yes, I did.

Q. And what was the conversation about?

Mr. Rimel: Your Honor, to which we object, as any oral conversation preceding the execution of the written contract would become a part of and merged in the contract, and, therefore, not properly admissible to vary the terms of it.

Mr. Erickson: I believe the objection is the crux of this whole case, your Honor, and the view we take of it, if I may address myself to the Court on it, is two or three pronged. In the first place, we think a reading of the contract shows it is one of those which is so ambiguous and so contradictory in its terms that the parol evidence rule permits of oral testimony for two purposes. One of them, of course, is to show what the real agreement is since it can't be determined from the contract itself, and the other is to put the Court in the same position as the parties when the Court tries to construe this contract and give it a construction that will make it an instrument that has meaning. Then, in addition to that, we take the view that any of this testimony, and I propose to examine this witness and others, if I may, in some detail as to just exactly what this was all about, because in the contract it is provided

(Testimony of Glenn Woodbury.)

there be furnished an abstract showing marketable title, and the authorities are uniform in the matter of construing that language, you may introduce parol evidence to show what the [72] parties intended at the time to be a marketable title. Then, there is an additional reason for examining witnesses on all of these points. The language as to the abstract says the abstract shall be furnished continued to a date subsequent thereto, and nothing further, no date or anything else fixed on it. Then, we think finally all of this testimony is admissible because we have pleaded in our complaint that there was a fraudulent purpose on the part of Clermont in his actions here, and there is a mistake in the language of the contract itself; and then finally we take the view that since this is an action in which we ask for specific performance, as well as defending, that we have the usual latitude in the matter of evidence, and that is our basic position, your Honor.

Mr. Rimel: May we be heard?

Court: Yes.

Mr. Rimel: We likewise take a three pronged position in this matter. In the first place, we don't feel this contract with respect to the question of furnishing the abstract, is ambiguous. The contract in Paragraph 1 clearly requires that the seller shall, at his expense—and it is paragraph 1 in the series, it is the first paragraph in the contract, the first thing to be done, “Seller shall at his expense furnish Purchaser an abstract of title continued to a date subsequent hereto showing merchantable title

(Testimony of Glenn Woodbury.)

to the above described property vested in Seller, or in lieu thereof, at Seller's option, [73] "a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except mortgage to B. Jannsen, \$16,200.00, and Federal Land Bank \$3,563.98. It is further agreed that the broker assumes no responsibility in regard to the title and broker recommends that Purchaser have the abstract of title or title insurance policy examined by an attorney." Paragraph 4, and I do emphasize the "4", because it follows somewhat lower in the contract, provides in part, and the part I am leaving out is irrelevant, "If Seller's title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing statements of defects is delivered to Seller, then said earnest money herein receipted for shall be returned to the Purchaser on demand, and all rights of Purchaser terminated unless Purchaser waives said defects and elects to purchase;". Your Honor, there is the first point that this contract is clear on what is to be done. Paragraph 1 in a series provides that the Seller shall furnish an abstract, and the broker recommends that the Purchaser have the abstract examined, so that is something to be done while the broker is still in the picture. The time contemplated there is the preliminary stages. Paragraph 4, much later in the series, provides that if the Seller's title is not merchantable and cannot be made so within a reasonable time after notice of defects, that then said earnest money receipted for

(Testimony of Glenn Woodbury.)

shall be returned to the Buyers. [74] Your Honor, that did not contemplate any further payment. It says, "Said earnest money which is receipted for herein." It doesn't say "Said earnest money and any other payments," so the contract, we feel, clearly by the language of Paragraphs 1 and 4, requires the abstract of title and the merchantability of that title be shown before the Buyers are required to do anything further under the contract.

Secondly, your Honor, we urge this point upon the Court: As the Court and counsel know, the interpretation that the parties themselves put upon a contract or agreement is of strong influence with any Court in determining what is to be done thereunder, and I might cite a case or two to the Court on that. The case of Cook-Reynolds Company vs. Beyer, 107 Mont. page 1, is such a case, and there are many in Montana; and here the Court can see through the pleadings themselves and things that are admitted in the pleadings that on May 2nd this contract was executed, that on June 11, 1953, the defendants not having furnished abstracts of title, the plaintiffs, by letter, made request for the abstract, and it is admitted that was done. Now, the next thing that happens is that on June 18th, the defendants furnished the abstract, and so they did interpret the contract, the parties interpreted the contract just as we feel it should be interpreted, and that is our second point we urge upon the Court.

And then, lastly, and before arguing this, I should point [75] out to the Court that our action here is

(Testimony of Glenn Woodbury.)

based upon the contract, it is based upon this contract right in Paragraph 4, to have the money returned to the Buyers, the title being unmerchantable. This is not an action for rescission, but we might argue here, your Honor, that even if this contract did not have the language of Paragraphs 1 and 4, even if we were to disregard that, and our situation were to be something else, that Paragraph 2 of the contract clearly says that the real property is to be conveyed by contract for deed, whatever that is in the way of a conveyance, and the personal property by bill of sale free and clear of all liens and encumbrances. I admit that the term "contract for deed" as a conveyance is somewhat new to me and doesn't make much sense, but regardless, the conveyance was to be free and clear of all liens and encumbrances. That part of Paragraph 2 is clear, it is in printing, and this being true, even if this contract did not have Paragraphs 1 and 4, and even if it weren't for the clear interpretation by the parties, placed by themselves on those paragraphs, which we think is in keeping with the language, then it is our view that the Montana cases on the contract requirement of a conveyance free and clear of encumbrances would require proof of the merchantability of their title prior to the time for payment, and I can cite to the Court the case of *Bozdech vs. Montana Ranches Company*, 67 Montana, 366, that held when a vendor is unable to convey the title stipulated for in [76] his contract at the time a conveyance is due, the vendee is not required to make any tender of the

(Testimony of Glenn Woodbury.)

balance of the purchase price as a prerequisite to his right to rescind. I am merely citing these to show the general rule in Montana. Our action is not for rescission, it is based on Paragraph 4. Again in *Silfvast v. Asplund*, 93 Montana, 584, the Montana Court said that a purchaser has the right to expect the removal of the defects before the time set, as the rule which allows a vendor to remove defects after the time for final performance does not apply when time is of the essence of the contract; and in this contract, the last clause, paragraph 7, states that time is of the essence of this agreement. Our third proposition is that if we didn't have Paragraphs 1 and 4, which in series, and by their very language require an abstract showing merchantable title to be furnished first, and even if the parties hadn't interpreted the contract in keeping with that, then, the Montana rule is clear.

So, in line with all those propositions, we feel there is no cause for bringing in parol evidence attempting to vary the terms of this contract. This action is brought upon the contract Paragraph 4, which gives the buyers, plaintiffs here, the right of recovery, and we don't think the terms of that should be varied merely because the parties that had the contract prepared, and they admit Hagarty is the sellers agent, now claim it is ambiguous. I think the Court may refer to the [77] language in the *Bozdech* case cited previously, 67 Montana, 366, where the contract was drawn by a real estate agent, and it was shown there was an encumbrance there

(Testimony of Glenn Woodbury.)

not mentioned in the sales agreement, and our Court there said, "The authorities are unanimous in supporting what is therein said concerning encumbrances affecting the title to lands"—pardon me, I have got the wrong part of that. Here is the language I was searching for—I may have to correct myself on the case. It is the case of Hollensteiner against Anderson, 78 Montana 122. It was in that case where the contract was prepared by a landowner and fails to describe certain encumbrances, and there was a reservation of minerals, and the Court's language there is that "If it was the tentative agreement of the parties that the purchase was of the land subject to the rights of the Anaconda Company, the vendor should have had his contract so drawn; having failed to do so, he was precluded by the provisions of Section 10517, R. C. M. 1921, from varying the terms of the written contract by parol evidence, a sad commentary on the practice of having important legal documents drawn by a layman.

This testimony, admitted over the objection of plaintiff, was therefore improperly admitted and cannot aid the findings made." We feel the Hollensteiner case is very much in point. The vendors here should not be able to say "This is ambiguous, and we want it reformed," when their agent prepared it, and that is the testimony now before the Court and admitted by [78] counsel, that he was the agent of the seller, and, therefore, the parol evidence rule should apply and this case should proceed upon the contract itself.

(Testimony of Glenn Woodbury.)

Mr. Erickson: I have cited the same cases in a little trial memorandum I have prepared, but it is not in as good condition as it ought to be. In the Bozedeck case, the Court held the vendor could have no title at all at the time of the making of the contract, and if he was prepared to come through with good title at the time title was to be conveyed, he has complied.

I think one of the things the Court is going to have to determine here, which can't be determined from the contract, is the question of when the title was going to pass. We believe we are entitled to show what the understanding was at the time as to when the abstract would be furnished, and when the title was to be available, and we think under all the rules we are entitled to show that. I found a case yesterday, which I have cited in my little trial memorandum, *Bridges and Company, Inc. vs. Bank of Fergus County*, 77 Montana, 524, and the Court said in that case, "The face of an instrument is not always conclusive of its purpose. The rule regards the circumstances of the parties and executes their real intention, and prevents either of the parties to the instrument from committing a fraud on the other by claiming it to be what it in fact is not." In other words, the real transaction may be proved, [79] and that is all we think we are trying to do here, and I don't believe it necessarily varies the terms of the instrument, but I think the instrument is so ambiguous, I think it has both latent ambiguity and extrinsic ambiguity. Finally, I would say we have spe-

(Testimony of Glenn Woodbury.)

cifically pleaded that by a course of conduct of the purchasers, they waived the right to object to the title offered; and as to the matter of the construction the parties placed on the contract itself, we will hope to introduce testimony on that point.

Court: Well, the ruling of the Court upon this could be crucial in the case right at this point. For the benefit of counsel, I may say I am inclined to the position taken by the plaintiffs. However, a ruling upon it might foreclose the defendant, and I would prefer, and I can more properly rule upon the matter after a more full consideration of the case and the evidence presented by the defendant, and I am, therefore, going to reserve ruling on the matter and permit the defendant to go ahead with his evidence, and incidentally give him an opportunity to educate me.

Mr. Rimel: May it be stipulated that all the evidence will be considered in the same——

Court: Yes, it will all be received in the light of your objection and the ruling upon it, and we will proceed along that line, and you may rest assured the Court will keep in mind your objection and make a ruling upon it when it proceeds [80] to make a determination of the facts in the case and the law.

Mr. Erickson: It occurs to me along the same line, your Honor, since the matters you have grasped as crucial, that the brief that I have prepared on the matter, while it has the principal authorities, it is not as complete a brief as would like to submit.

Court: I think as it goes along, and at the close

(Testimony of Glenn Woodbury.)

of the evidence, for example, you may feel you would rather make another and different and more definite statement with reference to your position, and I will be happy to receive that. One of the things I am concerned about is, for example, because one clause in the contract may be ambiguous, if that clause itself is not determinative in the settlement of this action, is that any reason for opening up the contract to parol testimony. For example, the contract for deed proposition, that is an ambiguous thing, but because that is ambiguous, does that mean you can proceed by parol testimony to explain what they were talking about when they were talking about furnishing an abstract of title. You see, I don't know that the provisions of the contract providing for the furnishing of an abstract of title are ambiguous, and if they are not ambiguous, then should any parol testimony be received upon the matter?

Mr. Boone: May I make a further comment, your Honor, with respect to the clause "contract for deed"? I think there is a reason for that language to be in there. I call the [81] Court's attention that the initial purchase price was \$36,000, the amount receipted for was \$5,000, leaving a balance of \$31,000, and it contemplated an \$11,000 payment. If the Court will take the exact amounts on the mortgage to Jannsen of \$16,200, plus the mortgage to the Federal Land Bank, the Court will note that there is a difference of approximately \$200 in there. In other words, in addition to assuming those two mortgages,

(Testimony of Glenn Woodbury.)

your Honor, the Clermonts, after making the \$11,000 payment, would still owe Woodbury a couple of hundred dollars, so that there is a basis for a contract for deed. In other words, Woodbury's interest wouldn't be cleared out entirely by the \$11,000 payment. He would still have something over \$200 coming.

Court: Yes, I think that may be the situation, and you may, as a result of explanation and parol evidence, explain and show what was actually meant by this and that it does mean a contract for deed actually, but because that is, as I say, because there is some ambiguity there, it doesn't open up the whole contract, does it, to parol evidence?

Mr. Rimel: That is the way we view it.

Mr. Erickson: My view would be somewhat different than that for this reason: The general rule is when it is obvious the instrument is not intended to be a full agreement, then the Court has a very great latitude in determining what the full agreement is, and it might have the effect of varying [82] terms more or less specific.

Court: Yes, I can see that too, I can see there is that possibility. Let's proceed in any event. Understand my position is that I don't want to make a crucial ruling on a point that would foreclose the defendant, or the plaintiff as far as that is concerned, and I think we will do better by proceeding with the testimony and letting the Court make a decision at a more leisurely pace.

Mr. Erickson: May I interject one more thought?

(Testimony of Glenn Woodbury.)

Counsel, in his memorandum to the Court on the Motion to Dismiss, says the language in Paragraph 2 is nonsensical because the obvious intent was that the Woodburys would be paid in full and would convey title. That is a pretty good indication it does require some study. Then, I would say one more thing on the matter of looking into language that is clear. I think that is also subject to the rule that it must be harmonized, even if that has the effect of making what appears to be specific express language say what it says or varying it some. I believe that is also an exception, that you can look into the whole contract where you have to harmonize all of it, to make it have meaning.

Court: Well, Court will stand in recess for 15 minutes.

(15-minute recess.)

(Glenn Woodbury on the Stand - Direct Examination by Mr. Erickson.)

Court: Very well, you may proceed with your questioning. [83]

Mr. Erickson: Would you read the last question?

(Question read back by Reporter as follows:

Q. And what was the conversation about?)

A. That was down in the field, as I recall it.

Q. What was it about?

A. Well, it was about the purchase of the place.

Q. And were Mr. and Mrs. Clermont present at all times when this conversation took place that you are about to relate?

A. They were there all of the time.

(Testimony of Glenn Woodbury.)

Q. Go ahead, tell us what that conversation was?

A. Well, there was a quite a conversation. It will take quite awhile to give it all, but they asked the price, what I wanted for the place.

Q. What did you tell them?

A. I told them \$38,000. They wanted to know the terms. I told them I didn't know the exact terms, but I wanted my equity out, and it would be approximately half of the purchase price, which was around \$18,000.

Q. Did you, at that time, discuss where the rest of the money was to go?

A. Yes.

Q. Tell the Court that discussion?

A. I told them I wanted my equity out, and I had a contract with a fellow by the name of Bernhard Jannsen, which was a good contract, three percent interest; and I wanted to take my [84] money out because I had other places to use the money, and then this contract with Mr. Jannsen.

Q. Was there any discussion with reference to the Federal Land Bank mortgage referred to in the pleadings?

A. Yes, it was mentioned too that there was a mortgage to the Federal Land Bank, and I had a contract with Bernhard Jannsen.

Q. Was there any discussion of the balance due on the Bernhard Jannsen contract?

A. Yes, I told them it was approximately \$16,000, as I recalled it.

Q. Was there any further discussion of the terms of the Jannsen contract at that time?

(Testimony of Glenn Woodbury.)

A. Yes, as to the way it was paid, the amount of payments and the rate of interest.

Q. What was said about that?

A. Well, it was \$1,000 a year and three percent interest, which we explained to Mr. Clermont was about as cheap a rate of interest as you could ever hear of and which made it a very good contract, and he agreed with it.

Q. At that time was there any discussion about the fact the land was irrigated? A. Yes.

Q. What was that discussion?

A. Mr. Clermont asked where I got the water.

Q. Did you tell him?

A. Yes, I told him it came from what was called the Big Ditch. He asked where that water came from. I said, "It comes from Lake Como," and he wanted to know where Lake Como was, and I told him it was up around Darby somewhere. I didn't even know myself; I don't yet, I never been there.

Q. Was there any discussion of the cost of water? A. Yes.

Q. What was that?

A. He asked what the water cost, and I said, "Well, it varies," I said, "but last year it was around \$4.00 an acre, or was \$4.00 an acre, or it might have been \$4.10, I don't know for sure. It has never been the same any year since I have been there." and Mr. Clermont said, "Is that all for maintenance, or is part of that for construction?" and I said, "Part of it is for construction," and he said, "Well, maybe some of that will get paid off

(Testimony of Glenn Woodbury.)

some day then," and I said, "Yes, I understand part of it goes to pay off, it is a Federal Government loan on the Ditch, the Government financed the ditch," and I said, "I understand a portion of that goes to them to pay for the construction, but," I said, "I don't know how much per year, but some of it goes for construction," and he said, "Well, it will eventually get paid out then, won't it?" I said, "Yes, is might not be in my or your time, I don't know, but," I said, "I guess eventually it will pay out."

Q. Any further discussion at that time of the irrigation or the water?

A. Well, at the same time, I told him, I said, "I don't know too much about it, but," I said, "If you want to know any more about it, the place to go is Hamilton, either to the Courthouse or the Irrigation District. They can tell you all about it. I don't know any more than I am telling you, but if you would like to know, find out when it pays out and how much there is against it, why go to Hamilton and inquire at either the Courthouse or the Irrigation District." I said, "I don't know which place can tell you, but the water comes right with the tax assessment and is paid with the taxes. So," I said, "I imagine the Courthouse could tell you."

Q. Now, what further conversation took place at that time out in the pea field?

A. Well, among other things, Mr. Clermont said that if he had to pay me \$18,000, it wouldn't leave him anything to go on, is the way he put it, to buy stock and machinery, and wanted me to take less

(Testimony of Glenn Woodbury.)

down payment and then carry, finance part of the place myself, and I told him no, rather than do that, I would rather take less money, because I wanted to assign my contract with Jannsen to him, take my money out, and be clear out of the picture.

Q. Now, what was his response to that?

A. Well, he wanted to know how much less I would take, and [87] I asked him how much—I said, “How much can you give and pay me out so that I will be out of it.” I remember remarking this to him, I said, “There is already a mortgage to the Federal Land Bank and a contract to Bernhard Jannsen, and” I said, “if we make a new contract between you and I, it would get pretty complicated, and,” I said, “therefore, I would like to just be out.” I also asked him what amount he could pay and still leave him something to go on, and he, before the conversation was ended—I don’t remember who brought it up, but anyway, the proposition was put to me to give him a share of the crop, landowner’s share of the crop, and make the money \$36,000.

Q. \$36,000 would be the total purchase price?

A. Yes, and that way that would leave him enough to go on. If I took \$2,000 off the purchase price, that would leave him something to buy stock and machinery.

Q. Was anything further said during the conversation in the pea field?

A. Well, I suppose there was.

Q. But I mean with relation to these negotiations that you now recall?

(Testimony of Glenn Woodbury.)

A. There was quite a few things talked about. He first wanted—at one time in the conversation, he asked me if I wouldn't lease the place to him for a year so that he would—now, wait a minute, I am possibly mistaken there. One proposition, [88] he wanted to work for me for a year. Now, I am not sure whether he brought up the lease proposition or not. He wanted me to hire him for a year so he would know what the place was like. I told him if he bought the property and I continued to farm it—he didn't want to farm it that year he said because it was too late to buy his machinery and stock, and he had a job, but he might come and irrigate it for me and live on the place, and I told him that I would hire him to work and irrigate it if he wanted to if he bought the property, but otherwise, I had what men I needed.

Q. Now, did you at that time make this contract which is attached to the complaint, and the one you are familiar with, of May 2nd?

A. Did we make it then?

Q. Yes.

A. Not right then; we made it the same day.

Q. After your conversation in the pea field, at that time you didn't come to any agreement, is that correct?

A. That's right. He had made me an offer, but I hadn't accepted.

Q. Then did the Clermonts and Mr. Hagarty leave? A. Yes.

Q. Did they return later in the day?

(Testimony of Glenn Woodbury.)

A. Yes.

Q. How much later? [89]

A. Oh, approximately two hours.

Q. Did you then have a conversation with Mr. and Mrs. Clermont? A. Well, a little, yes.

Q. Whereabouts?

A. In front of my house where I live.

Q. Who was present at that conversation?

A. Them, Mr. Hagarty and myself.

Q. Did that conversation concern this deal which you were about to enter into? A. Yes.

Q. What was that conversation?

A. I came out of the house and met them as they drove up in the car, and Mr. Hagarty asked me if I had made up my mind to deal, to make the deal. I said, "I don't know, I haven't had too much time to think about it." Mr. Hagarty said, "Well, we have been talking it over, and we decided that if you accept this deal, inasmuch as Mr. Clermont is receiving a share of the crop, it would be no more than right that he pay a share of the water and taxes for the year," and my exact words to Mr. Hagarty were, "You had better start to thinking over again," and he asked why. I said, "Because if I sell the property to you under those terms, Mr. Clermont will have to pay all the water and taxes," and he asked me why, and I told him that according to my understanding of the deal, Mr. Clermont would be the owner of the ground and I would be the tenant leasing it from him. and I said, "I have leased ground from other parties before, and never had to pay

(Testimony of Glenn Woodbury.)

water and taxes for the land owner if I leased on a share crop." Mr. Hagarty turned to Mr. Clermont and he said, "Well, maybe that's right, what do you think about it, Mr. Clermont?" He said, "Well, I guess that's right," and Mr. Hagarty said, "Well, do you want it that way then?", and Mr. Clermont said, "Yes, I will pay the water and taxes," and Pat turned to me and said, "What about it, are you ready to deal?" I said, "I guess, come on, let's fix it up," and we went in the house.

Q. Who was present at the house when the deal was fixed up?

A. Well, Mr. Hagarty, Mr. and Mrs. Clermont and I were in the front room, and my wife, I think, was in the kitchen at the time.

Q. Now, at that time, and during the time you were fixing up the contract—who fixed up the contract, by the way?

A. Mr. Hagarty.

Q. Was there then any discussion of your contract with Bernhard Jannsen?

A. Yes, there was.

Q. What was that discussion?

A. When Mr. Hagarty went to write out this agreement of his, he asked what the amount to Bernhard Jannsen was, and what the amount to the Federal Land Bank was, and I told him that the Bernhard Jannsen contract was about \$16,000, I didn't remember, I thought it was an even \$16,000, but it since turned out to be \$16,200, but we used the general term "about", and I believe that is what Mr. Hagarty wrote in the contract, and I looked in my desk and got my last Federal Land Bank statement,

(Testimony of Glenn Woodbury.)

receipt for the payment, and we got the amount off of it, I believe, and Mr. Hagarty asked me if I had the Jannsen contract handy, and I told him, I said, "I have got it here, I don't know just exactly where it is here." I keep my drawer in kind of a haphazard fashion, and I didn't know exactly where to put my hand on it. I said, "If you want it, I will find it." Everybody seemed to be in more or less a hurry. I was busy in the field and wanted to get back to work, and they seemed to be more or less in a hurry, and Mr. Hagarty turned to Mr. Clermont and asked him if he would like to read this contract with Jannsen. He said, "No, that isn't necessary. When I pay the other \$11,000, why we can get that." I said, "Yes, I'll find that contract, and I will make an assignment of this contract to you," and he said that was okay anytime just so he got the contract by the time he made the \$11,000 payment. There was also some discussion there as to when the \$11,000 should be paid.

Q. What was the discussion?

A. I asked him when he wanted to pay it, and he said as soon as he got his money from Canada, and I asked him when that [92] would be, and he said it would be most any time, he could have it within a few days and suggested that we make the payment due the 15th of May, and I told him something might go wrong and he might not get it by the 15th of May. I said, "You had better make it the 15th of June." He said, "I am sure I will have it by the 15th of May," and I told him, "Well, if

(Testimony of Glenn Woodbury.)

you have it, you can pay it, it doesn't make any difference, pay it as soon as you want, but," I said, "you had better take another 30 days because I am in no hurry, and you never know, something might happen and you wouldn't have the money by the 15th of May," and I said, "the 15th of June is just as good as to me as the 15th of May," so Mr. Hagarty put it the 15th of June.

Q. Was there at that time any further discussion of either the water or the Jannsen contract?

A. Well, nothing more than what I have mentioned, not that I remember.

Q. I have reference to the conversation at the house.

A. Well, only that I told him I would assign the contract to him, I would have the contract available on the payment of the \$11,000, and make an assignment of my contract to him.

Q. And was it at that time that Mr. Clermont paid the \$5,000?

A. Yes.

Q. And of the \$5,000, what amount did you get?

A. \$4,000. [93]

Q. And the other \$1,000?

A. Mr. Hagarty. I might add, if there is no objection, it might have no bearing, but you was asking what conversation took place. Among other things, as Mr. Clermont wrote out the check, or handed the checks to us, he turned to Mr. Hagarty and asked him if he thought he would get that \$1,000 back he paid on the place over at Great Falls. That was the

(Testimony of Glenn Woodbury.)

first intimation I had that he had been in any other deal that he was trying to back out of.

Mr. Boone: Move to strike that, your Honor.

Court: It may be stricken.

Q. Now, when did you, or did you have further conversation with either Mr. or Mrs. Clermont?

A. Yes.

Q. I assume after this instrument, after it was signed, they left, is that correct?

A. Yes, they left within a few minutes.

Q. When did you next have a conversation with either Mr. or Mrs. Clermont?

A. Well, I don't know the exact date, but it was either the Sunday following this day, or the second Sunday following.

Q. It would be sometime, then, in May, the early part of May? A. Yes.

Q. With whom did you have this conversation?

A. Mrs. Clermont.

Q. Where did that conversation take place?

A. At Frenchtown.

Q. What was the occasion of your seeing her at Frenchtown?

Mr. Rimel: I may anticipate a little, but may we have the same objection? I gather it could go similarly to this. We are getting into a field of conversations following the actual execution of the contract, as I understand it.

Court: Yes.

Mr. Rimel: I would like to make an objection at this time on the parol evidence rule, and also on the

(Testimony of Glenn Woodbury.)

Montana statute that a written agreement cannot be altered except by a written contract of the parties or by an oral executed agreement.

Court: What is the purpose of this?

Mr. Erickson: We have pleaded waiver in our pleadings of the right to demand the title called for, and in addition we have the rule of the conduct of the parties. We have in mind, and we have pleaded fraud.

Court: Subject to the objection, proceed.

Mr. Rimel: We would like to have the same understanding that our objection goes to all of this testimony.

Court: All of it, yes. You may proceed.

Witness: Where were we?

Court: You had a conversation down at Frenchtown.

Witness: You asked why I went there? [95]

Q. (By Mr. Erickson): Yes.

A. I went down primarily to see if Mr. Clermont was going to move on the property and irrigate for me that summer.

Q. And you saw Mrs. Clermont, but not Mr. Clermont? A. Mr. Clermont wasn't there.

Q. Did you have any conversation with Mrs. Clermont relative to this deal you made?

A. Only that she made the remark they might have made a mistake buying it, but she told her husband that she thought if they decided they didn't want it, Mr. Hagarty could resell it for them.

Mr. Rimel: We move the answer be stricken be-

(Testimony of Glenn Woodbury.)

cause it is not in keeping with counsel's stated purpose to prove waiver.

Mr. Erickson: We have pleaded—I don't want to be in the position of having said something to the Court which isn't completely correct. We have pleaded that these plaintiffs, within a few days after making the contract, determined they were not going to carry through its terms, and the testimony now, and the testimony we hope to offer later, will show that negotiations opened almost as once on the part of the Clermonts to get their money back without anything being said about the title or anything else. We have some conversations along that line. That is the purpose of the testimony, in addition to the waiver.

Court: Very well, but does this testimony prove that? [96]

Mr. Erickson: I think so. We will offer to prove through this witness and others that Clermont, on several different occasions, prior to the time he called for the abstract, came to see Mr. Woodbury and asked to receive his money back without mentioning the title or anything else, saying he wanted to get out of the deal and made various offers to draw a new contract. It is material to show two things. One is waiver, and the other, to sustain the pleadings. There was no motion to strike. Issue was made on it that the purpose of these plaintiffs in calling for the abstract was to fraudulently relieve themselves of the obligation to perform under the contract.

(Testimony of Glenn Woodbury.)

Mr. Rimel: We object on that statement to the proposed testimony on the basis of relevancy, your Honor.

Court: I am concerned about it myself, but I will permit you to proceed with it. What you have already testified to doesn't prove anything, just if we decide we don't want it, we can make another deal. That is all that was said. I don't know, I don't think that proves anything except that is the position everybody is in, if they make a contract and don't like it, they can make another deal.

Mr. Erickson: I think it has relevancy for the additional reason that one of the things the Court has to determine—I don't agree with counsel that it is easy to determine from the contract what the parties contemplated when they talked about the time to which the abstract was to be continued, when the [97] deal was to be closed. It has some relevancy along that line.

Court: I will reserve ruling on the objection, and you may proceed. It is time for noon recess. Do you want to come back at 1:30 or 2:00?

Mr. Erickson: I am hopeful, your Honor, we might be able to complete the case today. I would as soon come back at 1:30.

Court: All right, do that. Court will stand in recess until 1:30.

(Noon recess.)

(Glenn Woodbury on the stand, Direct Examination by Mr. Erickson.)

Q. At the conclusion of this morning's session,

(Testimony of Glenn Woodbury.)

you had testified concerning a conversation you had with Mrs. Clermont at Frenchtown. Now, after that, did you have any further conversation with either Mr. or Mrs. Clermont? A. Yes, I did.

Q. And with whom was the next conversation?

A. Well, mostly with Mr. Clermont.

Q. Where did that conversation take place?

A. At the house at the ranch.

Q. And can you give us an approximate date on that?

A. Well, I think it was the Sunday following. It was a Sunday, I am quite sure, and I think——

Q. The Sunday following the making of the agreement?

A. No, following the conversation in Frenchtown, the visit [98] Mr. Hagerty and I paid them in Frenchtown.

Q. With relation to the month of May, was it in the month of May?

A. Yes, I am sure it was.

Q. Who was present at that conversation?

A. Well, during most of the conversation that had any bearing on the deal, Mr. Clermont and I were in the front room, and I believe his wife and mine were in the kitchen. They came out there in a rainstorm and had a little trouble. They had gotten in a neighbor's field and had gotten stuck and my boy and I went down and pulled them out. While they were coming, my wife fixed dinner for them. We had dinner, and after we ate, Mr. Clermont and

(Testimony of Glenn Woodbury.)

I went in the front room to discuss the deal. I believe our wives stayed in the kitchen.

Q. What was the discussion at that time?

Mr. Rimel: I hate to interrupt, but may our general objection go to all of this?

Court: Yes.

A. You say what was this discussion?

Q. Yes.

A. He informed me at that time that since he had made the deal, he was having a little trouble getting his grain sold in Canada, and the party that had bought his property there was unable to make the payment, so he thought it would help him considerably if I would take about \$5,000 of the \$11,000 and [99] put the other \$6,000 on a contract for him.

Q. Did anything result from that conversation? Did you make any change in the contract?

A. No, I told him I still felt as I had when we made the deal, that I was selling the property with the understanding I was to get my full equity out so I could have the opportunity of doing something else with it. I figured I could do more good than having it invested in that property. I also told him it would be a contract on top of the other contracts, and I told him that was the way we agreed and I felt that was the way it should be.

Q. At that time did Mr. Clermont ask anything about the title to your property? A. No.

Q. Any mention made about the abstract?

A. No.

(Testimony of Glenn Woodbury.)

Q. At any time was there any discussion had with Mr. Clermont about when the abstract was to be furnished? A. No.

Q. Did you have any further conversation with Mr. Clermont after the one you have reported?

A. Yes.

Q. When did that occur?

A. Well, I can't give a date, but I would say approximately another week, or maybe less. I don't remember that for sure. [100]

Q. Where did that conversation take place?

A. On the road leading from the main road up to my house.

Q. Did Mr. Clermont come down to see you?

A. Yes.

Q. Who was present at that time?

A. Just him and his wife.

Q. And yourself? A. Yes.

Q. What was the nature of that discussion in the road?

A. Mr. Clermont wanted to know at that time if I couldn't forget I had ever seen him and give him back his \$5,000.

Q. Was that the general language he used?

A. Well, pretty well.

Q. I mean he said something about "can't we just forget the whole thing"?

A. Yes, he thought maybe we could forget we had ever seen each other because at the time I made the deal I didn't seem to care whether I sold it or

(Testimony of Glenn Woodbury.)

not. He thought I would just give him back his money and forget we had ever met.

Q. Any discussion then about the abstract or title? A. No.

Q. You didn't agree with him, I take it?

A. No, I didn't.

Q. Did you discuss then anything about redrafting the contract or working out any deal or anything? [101]

A. I asked what the trouble was. He informed me again he wasn't able to get the money he had coming, and I told him I wasn't going to hold him to that specific date. He said that he couldn't afford to lose the money. I said, "I don't want you to lose your money; I don't want your money for nothing, I merely want to complete the deal. I sold the place to you in good faith and I thought you bought it in good faith. All I want is to complete the deal, but as far as the date of the 15th of June, I don't figure on holding you to it if you don't have the money at that time."

Q. Did you have other conversations along similar lines with Mr. Clermont along with that one?

A. Yes, he returned again.

Q. And was the subject of the conversation about the same as what you have reported as to the other two? A. Just about the same.

Q. No agreement was reached? A. No.

Q. After those conversations, when did you next hear from Mr. Clermont, if you did?

(Testimony of Glenn Woodbury.)

A. You mean after all of these conversations?

Q. Wes. A. Well——

Mr. Erickson: May I have that last question stricken, your Honor, there was a point I overlooked. [102]

Court: Yes.

Q. During these conversations with Clermont after May 2nd, was there any discussion of the Jannsen contract with him?

A. Not specifically, only in our talkings of whether I should write him a new contract or not, I made it clear, I thought, that I expected to have my equity out and assign the contract to him so I would have no more equity.

Q. Did you receive a letter from Mr. Clermont about sometime in the middle of June?

A. Yes, I received a registered letter from him.

Q. I believe that is a letter that has been admitted in evidence, dated June 11th, Plaintiffs' Exhibit 2. Do you recall having seen that letter?

A. Yes, I saw it.

Q. What date did you receive that letter?

A. June 15th.

Q. How do you fix the date as June 15th?

A. Well, because I considered that the payment was due on June 15th, and I thought that that was kind of a funny time to be asking for the abstract, the date the payment was due.

Q. I note from a copy of the 1953 calendar that the 11th, which is the date the exhibit bears, is a Thursday, and I think you have already testified it

(Testimony of Glenn Woodbury.)

came by registered mail. Do you recall what date you got the notice, what day of the week? [103]

A. It was the last—it depends on what day—I received the notice one day and I went to the post office the next mail day.

Q. You live out in the country? A. Yes.

Q. I note the 15th is Monday on the calendar. Would you say you had gotten the notice on the Saturday preceding, which would be the 13th?

A. Yes.

Q. And you actually received the letter, however, on June 15th, is that correct?

A. That's right.

Q. Now, upon receipt of that letter—or prior to the receipt of that letter, had anyone made any demand on you for the abstract?

A. As far as my memory serves me, the abstract had never been mentioned.

Q. That is the first notice you had that anybody wanted the abstract, is that right?

A. That's right.

Q. What did you do in response to that letter of June 15th?

A. I got in my car about as fast as I could and went to see a lawyer.

Q. Who did you go to see?

A. Claude Johnson.

Q. After that, what did you do, if anything, with relation [104] to that letter?

A. Contacted Mr. Geiman.

Q. Is he the abstracter?

(Testimony of Glenn Woodbury.)

A. He is the abstracter.

Q. Also an agent for the Federal Land Bank?

A. Yes.

Q. What did you do then, you contacted him?

A. I got him to give me the abstract to take to Mr. Boone.

Q. Did you do that? A. Yes.

Q. Did you have a conversation with Mr. Boone about that abstract? A. Yes, I did.

Q. Where did that take place?

A. In Mr. Boone's office.

Q. Who was present?

A. Mr. Boone and I.

Q. Tell us what that conversation was?

Mr. Rimel: Objected to, your Honor, the time and place not fixed.

Q. Was that on June 15th? A. Yes.

Q. About what time of day was it?

A. Oh, it was in the afternoon sometime.

Q. And it was in Mr. Boone's office? [105]

A. Yes.

Q. All right, tell us now what that conversation was?

A. After waiting quite awhile to get admitted to Mr. Boone's office, I went in with the abstract and informed Mr. Boone I was there with the abstract on the contract, the Jannsen abstract, and he said that was fine, and I said, "But there is another item that I think should be taken care of at this time before you receive the abstract." He wanted to know what that was, and I told him that there was a mat-

(Testimony of Glenn Woodbury.)

ter of about \$11,000 payment that was due that day, and he informed me they weren't going to pay me \$11,000 or any more money on that contract until they had a chance to examine the abstract. I agreed with him that that was quite all right with me, I didn't expect him to give me any money, but I asked him if he thought it was any more than right that he have the money in his possession when he examined the abstract inasmuch as the payment was due that day, so if the abstract was not right and I was out an expense to make the abstract right, that I had no assurance that the deal was going to be completed.

Mr. Rimel: If I may break in. We object to this line of testimony on the ground it seeks to interject an opinion. I admit it is Mr. Boone's opinion on something governed by the contract itself, and I think it is therefore irrelevant.

Mr. Erickson: May it please the Court, the testimony elicited by Mr. Boone had to do with a course of conduct, and [106] the comment was made by Mr. Rimel that we assumed that the abstract had to be brought in at a certain date because of conduct on our part. He seeks to bind us by conduct. I feel we have the right to show exactly what transpired when we produced the abstract.

Court: Very well, you may proceed. I will reserve ruling on the admissibility of it.

Q. Now, you have just testified in your conversation with Mr. Boone you said something to the effect that you wanted to be assured the money was

(Testimony of Glenn Woodbury.)

available so if there was a defect and you corrected it, the deal would go through. Was that in substance what you said? A. Yes.

Q. What further was said?

A. I just told him I didn't want the money myself, I wanted him to have the money and hold it and if the abstract was okay, deliver it to me, and if it wasn't, I would make the abstract good, whatever it took, and when I made it good, I wanted the money to be there as assurance. He told me he couldn't do that because the Clermonts weren't there. I said, "Where are they?", and he told me they were in Canada, and I said, "Isn't that kind of a funny place to be on the day the payment becomes due?" I said, "I don't generally do business that way myself," and he said, "Well, you can suit yourself, you can leave the abstract or not." I said, "I want to leave it, but I want the money, [107] and no money, no abstract."

Q. So what happened then?

A. I walked out with the abstract.

Q. Did you subsequently return to Mr. Boone's office? A. Yes.

Q. How long afterwards was that?

A. I believe that was on the 18th.

Q. And what, if anything, happened with relation to the abstract then?

A. I reported back to Mr. Johnson in Hamilton, and he——

Q. Was he your attorney?

A. He was my attorney at that time.

(Testimony of Glenn Woodbury.)

Q. Mr. Woodbury, don't testify as to your conversation with Mr. Johnson, because he is not a party to this action and it wouldn't be admissible, but you consulted with your attorney, and after that you——

A. I returned the abstract to Mr. Boone.

Q. Now, after that happened, you received these other various notices, did you not, the one dated July 22nd, and one dated July 27th, and I think you are familiar with both of them, two other letters? A. Yes.

Q. What, if anything, did you do about those letters?

A. I turned them over to Mr. Johnson.

Q. And from the time you got the first letter, you have been [108] represented by counsel in these proceedings, have you? A. Yes.

Q. And you yourself have not discussed the matter further with the Clermonts, is that true?

A. I never never saw the Clermonts until today.

Q. Have you yourself had any discussion with the law firm of Smith, Boone and Rimel?

A. Not since that time.

Q. Since that date? A. No.

Q. So that any negotiations or discussions would have been handled by your counsel, is that true?

A. That's right.

Q. In your cross complaint, Mr. Woodbury, you have asked that the Court order these plaintiffs to carry out the terms of this agreement and perform

(Testimony of Glenn Woodbury.)

the agreement to purchase the property, have you not? A. Yes, sir.

Q. Are you still in a position, the same position you were in, that is, you still have the property under contract from Jannsen? A. Yes.

Q. I think you have testified the contract is current, it is not in default?

A. No, not in default. [109]

Q. Have you continued to pay the taxes and other charges against the property?

A. I have.

Q. Have you made payments under the Federal Land Bank mortgage? A. Yes.

Q. Are you still willing to go ahead with the sale of the property to the Clermonts?

A. Yes.

Q. Are you willing to apply the \$5,000 on the purchase price of the property? A. Yes.

Q. Mr. Clermont, are you in a position to pay off the Jannsen contract for deed and secure a deed to the property from the Jannsens?

Mr. Boone: Objected to as immaterial.

Court: Overruled.

A. I would be if they were willing to go through with the contract, yes.

Q. Was there ever any discussion of such a course of action prior to the time the contract was made between you and the Clermonts?

A. No.

Q. Now, as to the lien of the irrigation district for the original construction charges, you have al-

(Testimony of Glenn Woodbury.)

ready testified that [110] there was a discussion of the amount of the water charge, is that true?

A. Yes.

Q. And under the terms of the agreement, and under the discussions, it is your understanding that Clermont agreed to pay the water charges, is that true? A. Yes.

Q. Now, would you be in a position to go ahead with an arrangement with the district under which the property could be removed from the lien?

A. Yes.

Q. You have testified, Mr. Woodbury, that you reduced the price of that property from 38 to 36 thousand dollars to make the deal with Mr. Clermont? A. That's right.

Q. Did you have any other opportunities to sell that property at about the same time to others than Clermont?

Mr. Rimel: To which we object for the reason it is irrelevant.

Mr. Erickson: The relevancy of that, your Honor, in my opinion, is this: We have alleged there would be a loss to Mr. Woodbury in the event this deal does not go through, that he has lost an amount greater than the amount of the down payment, and it would be my purpose with this witness and another witness to show he missed other opportunities to sell the land because [111] he sold it to Clermont. Since then the price would be substantially reduced and he would now be unable to get a price sufficient to absorb the \$5,000.

(Testimony of Glenn Woodbury.)

Court: Very well, you may proceed.

A. What is the question again, please?

(Question read back by Reporter.)

A. Well, after I sold it to Mr. Clermont, I withdrew it from the listing; I didn't try to sell it at that time.

Q. You had it listed with Mr. Hagarty?

A. Yes.

Q. Now, since that date, did you relist it for sale?

A. Yes.

Q. Have you been able to sell it?

A. No.

Q. Have you had any offers on it, price offers?

A. No.

Q. How long have you lived in that immediate vicinity?

A. Three years the first of this month.

Q. And prior to that time, you had bought and sold other land in the Bitterroot, is that true?

A. Yes.

Q. Do you know anything about the value of ranch property in the Bitterroot as of May 2, 1953, compared to its present value?

A. Well, I know it would be a lot harder to sell it at the same price now as it was then. [112]

Mr. Boone: Move the answer be stricken on the ground no proper foundation has been laid.

Court: I'll sustain the objection.

Mr. Erickson: I have another witness to qualify as an expert.

Court: May I interrupt, counsel? Let me get your position straight with reference to this, par-

(Testimony of Glenn Woodbury.)

ticularly the conversation you had the witness detail between himself and Mr. Boone, what was the purpose of that?

Mr. Erickson: Two purposes. One of them, we think that the contract is ambiguous as to the date the abstract was to be furnished. We will put on another witness who will testify as to the specific understanding when the abstract was to be furnished, but we think that language requires explanation that the abstract will be continued to a date subsequent thereto; and Mr. Rimel has suggested by reason of the fact we furnished the abstract on or about the 18th that we agreed with their view that we were, under the contract, obligated to furnish the abstract on the 15th.

Court: It seems to me that that is just about what you proved, isn't it?

Mr. Erickson: No.

Court: You have the witness testify he went in and saw them and made demand for some money before he would deliver the abstract. Mr. Boone said, "No, we are not going to give [113] any money," so he left and went and saw his attorney, then came right back with the abstract.

Mr. Erickson: I think the proof isn't quite as open and shut as counsel has suggested. I think Mr. Woodbury's conduct indicated that he felt the payment of money was considered concurrent with the furnishing of the abstract, and you would have some question then as to when the abstract was to

(Testimony of Glenn Woodbury.)

be furnished and when the money was to be furnished.

Court: Well——

Mr. Erickson: I have considered it counsel's duty to tell the Court all the facts. That is what I am trying to do in the matter, and I think the evidence is——

Witness: Do I have the right to explain why I felt that way?

Mr. Erickson: No, I don't want your opinion, we want to know what you did and what you said. If there is something you left out on what you did or what you said, we want that with relation to your conversation with Mr. Boone.

A. Well, as I recall what I told him was that I didn't think they could require me to fulfill my part of the contract if they weren't ready to fulfill their part was the way I looked at the situation.

Q. And you testified that was the first you ever had any notice on the abstract was that letter which you received on the 15th? [114]

A. No one had ever mentioned abstract to me up until that day I got the registered letter.

Court: I call that to your attention so you can argue it. I don't follow it. It seems to me what it proves that whatever idea the plaintiff may have personally had, which would not control in this matter—he may have some idea entirely foreign to the language of the contract—but that he came in and made his demand, then he went to his attorney and then came back and supplied the abstract, so

(Testimony of Glenn Woodbury.)

it seems to me it proves almost the opposite of what you are intending it to prove. That is what I am concerned with. You will have to explain that to me so I can understand your position, because I don't know as it now appears.

Q. Mr. Woodbury, why did you bring the abstract in to Mr. Boone?

A. Well, because Mr. Johnson——

Mr. Boone: Just a minute, it is calling for a conclusion of the witness.

Mr. Erickson: I don't believe it is a conclusion, your Honor, in view of the fact——

Court: He has already testified that he went to his attorney—and obviously we can't receive the testimony of the conversation between him and his attorney, but that following that, he then returns with the abstract. Those are the facts to which we are limited. [115]

Mr. Erickson: I wonder if I might have a couple of minutes recess? That is all the testimony from Mr. Woodbury on our case in chief.

Mr. Rimel: I wonder if counsel could come in and talk to you before you return to the bench.

Court: Fine. Court will stand in recess until five minutes after two.

(10-minute recess.)

Court: You may proceed.

Q. Mr. Woodbury, did you in fact ever have a mortgage in which Bernhard Jannsen and his wife were parties with you? A. No.

Q. Was there ever any other instrument than

(Testimony of Glenn Woodbury.)

the contract for deed? A. No.

Q. Did you in any conversation with Clermont ever refer to the contract for deed as a mortgage, as you recall? A. No.

Q. Would you say you didn't ever refer to it as a mortgage?

A. I am quite certain I didn't.

Q. And your testimony earlier was that you discussed with Clermont several times the contract for deed you had with Clermont, is that true?

A. With Jannsen.

Q. With Jannsen. [116] A. Yes.

Q. Counsel pointed out, as you heard in the courtroom, that there was some difference between the total amount of \$36,000 to be paid and the total amount of the combination of the money owed to Jannsen and the Federal Land Bank and to you. Did you hear those comments of counsel?

A. Yes.

Q. Do you have any explanation of why the discrepancy between those items?

A. I think I mentioned once before, maybe I didn't, but as I recall, the contract Mr. Hagarty drew, it says about so much to Jannsen, doesn't it?

Q. I call your attention to the contract, which I believe is exhibit—it is attached——

A. Yes, it says "about \$16,500," and actually it was \$16,200, I believe. As I mentioned before, we didn't get a copy of the contract to look at it. Consequently, we didn't know exactly what the figures were at the time we drew that. We were

(Testimony of Glenn Woodbury.)

drawing that as a temporary agreement to hold us until the full deal—it was going to be until he got his \$11,000, and we were going to fix the whole deal up. Therefore, we were a little vague in the figures we were putting in. We were not specific, or we wouldn't have used "about" so much.

Q. You have testified in all of your conversations with Clermont, the idea was you were to get out of the picture entirely, [117] is that correct?

A. Correct.

Q. The \$16,000 would take you out of the picture?

A. That's right.

Mr. Erickson: That's all.

Cross Examination

Q. (By Mr. Boone): Mr. Woodbury, with respect to the Plaintiffs' Exhibit 2, as I understand it, this letter was sent to you by registered mail, and you were first notified by the post office that the letter was waiting for you?

A. That's right.

Q. Then, on Monday morning, June 15th, you went to the post office and got this letter?

A. That's right.

Q. And after receiving the letter and reading it, you immediately took off from Stevensville and went to Hamilton?

A. Correct.

Q. And went to consult an attorney?

A. That's right.

Q. And the attorney was Mr. Claude Johnson?

A. Yes.

(Testimony of Glenn Woodbury.)

Mr. Erickson: May it please the Court, I believe the witness is confused as to what he did on the 15th. I thought [118] that was a later date, Mr. Boone.

Witness: No, this was the 15th.

Q. So, on Monday morning, the 15th, after receiving the letter and after reading it, the first thing you did was go to Hamilton and talk to an attorney? A. Naturally.

Q. You took this letter to the attorney and showed it to him? A. Yes.

Q. After talking with your attorney you then went to see Mr. Geiman to get the abstract which had been demanded in this letter?

A. I believe Mr. Johnson called him on the telephone and asked him to get it ready.

Q. So, your attorney asked the abstracter to get the abstract ready which was demanded by this letter? A. That's right.

Q. After the abstract was prepared by Mr. Geiman, you then brought that abstract to my office?

A. Yes.

Q. But refused to leave it with me because I didn't have the \$11,000 in my possession?

A. That is correct.

Q. Then, as I understand it, you left my office on the 15th, and did you then return home?

A. I did. [119]

Q. When did you next go back to see your attorney? A. On the 18th.

(Testimony of Glenn Woodbury.)

Q. And which attorney did you go to on this occasion? A. Mr. Johnson.

Q. Would it change your testimony any if I were to suggest to you you went to see Mr. Koch in Hamilton on that date, would that change it?

A. I went to see him on one date. I don't remember if it was on that date or not, it could have been.

Q. Do you now recall you did see Mr. Koch about this matter of whether you should leave the abstract with me? A. Yes.

Q. So, it was Mr. Koch you consulted the second time with respect to this abstract, not Mr. Johnson? A. No, both of them.

Q. You went first to see Mr. Johnson, did you?

A. I believe, yes.

Q. After seeing him, then you went to see Mr. Koch, did you? A. I think so.

Q. You went to see both of them for advice on the question of whether you should leave that abstract with me for examination?

A. I believe so.

Q. After talking with both of them, then you returned to my office with the abstract of title and left it with me for [120] examination?

A. Yes.

Q. On the 18th when you left it with me, you did not on that day demand that I have the \$11,000, did you?

A. I didn't suppose it would do any good.

Q. But you didn't.

(Testimony of Glenn Woodbury.)

A. No, I didn't demand it.

Q. You didn't demand it on that occasion, and you left the abstract with me on the 18th for examination?

A. Yes.

Q. Now, may I borrow your calendar for a moment, please? Will you refer to the 1953 calendar here and tell us what day of the week was the 18th of June?

A. It was May, I believe—no, it was June. I think it was Thursday.

Q. So that on Thursday afternoon, June 18th, you left the abstract with me, correct?

A. Yes, I suppose that is, according to your records of the date.

Q. That is according to your testimony, Mr. Woodbury, isn't it? I am going by your dates on what you have testified.

A. I don't remember the date I took it into you, only by the claim you make. I suppose you are right.

Q. You accept my date as the 18th?

A. Yes. [121]

Q. Now, showing you Exhibit "B," a copy of the letter which was written to you on June 22nd, signed by the Clermonts, I will ask you when did you receive that letter?

A. Well, I can't answer that one.

Q. Well, was it within a day or two after that letter was written?

A. Well, I suppose about three days, that is about what time it takes to get a letter.

(Testimony of Glenn Woodbury.)

Q. Now, with respect to the abstract, at the time of leaving that abstract with me on June 18th, do you recall that you asked me after I had examined it to return the abstract to Mr. Geiman at Hamilton?

A. Yes.

Q. After I examined the abstract and this letter of June 22nd was written to you, you knew I had returned the abstract to Mr. Geiman?

A. Yes.

Q. And it was returned on June 22nd, or within a day or two of that date?

A. If you say so, I guess, I don't know.

Q. You later determined from Mr. Geiman that it had been returned to him?

A. Yes.

Q. And you and your attorneys have had access to that abstract ever since June 22nd, 1954, or thereabouts? [122]

Mr. Erickson: To which I object on the grounds I can't see the materiality.

Mr. Boone: The materiality is that the statement of defects has been furnished, your Honor, in accordance with the contract.

Court: The opportunity to correct.

Mr. Boone: To correct.

Court: Very well.

Q. So that abstract was available to you and to your counsel after I had returned it following my examination on June 22, 1953?

Mr. Erickson: I will agree to that.

Q. Now, then, after receiving this letter of June 22, 1953, did you take the letter to an attorney?

(Testimony of Glenn Woodbury.)

A. Yes, I took them all to an attorney.

Q. Did you take it promptly to an attorney?

A. I did.

Q. Who was the attorney you took it to?

A. Mr. Johnson.

Q. I see. Did you, at that time, acknowledge receipt of the letter of June 22nd to the Clermonts or to me?

A. Well, I couldn't answer that, I don't know, did I or didn't I?

Q. Did you or didn't you?

A. I don't know, did I? [123]

Q. I am asking you, sir.

A. My attorneys acknowledged all the letters I knew anything about.

Q. And do you have any copy of any communication from any attorney to me or to the Clermonts with respect to this opinion or statement of defects of June 22nd?

A. The only correspondence that I know anything about is I mailed a letter to you fixed by my attorneys and I signed it telling you I received your letter, your complaint, and was turning the matter over to my attorneys and you would hear from them.

Q. Are you referring in that connection, Mr. Woodbury, to the letter of July 30, 1953, attached as Exhibit "D" to the complaint, is that the letter that was written?

A. That's right, I guess.

Q. Now, isn't it a fact that there was no letter,

(Testimony of Glenn Woodbury.)

either from you, or from your attorneys, to the two letters dated June 22 of 1953 and to the letter of July 27, 1953, until your letter of July 30th?

A. Yes, that's right, that was three days after the one you wrote on July 27th.

Q. Yes, three days after the letter of July 27th.

A. That was probably the day I received it.

Q. And well after, a month after the statement of defects was furnished to you on June 22nd?

A. Yes.

Mr. Erickson: May I object, the letters speak for themselves.

Court: Yes, they do.

Q. When you received that letter of July 27th from Mr. and Mrs. Clermont, did you take that to your attorneys? A. I did.

Q. Was that also to Mr. Johnson, Mr. Claude Johnson?

A. I think I took it to him first, as I recall it.

Q. Then, was there any communication from you or from your attorney, either to the Clermonts, or to me, at any time after July 30th with respect to this matter before this action was commenced in October, October 7th?

A. Not to my knowledge.

Q. In other words, there was not one single thing either you or your attorneys did about communicating with the Clermonts or with me with respect to this title, with the exception of that letter on July 30th? A. No, I guess not.

Q. Now, you mentioned in your direct exami-

(Testimony of Glenn Woodbury.)

nation here that you relisted this property for sale. When did you do that, and with whom did you list the property? A. Mr. Hagarty.

Q. When did you list it, sir, that is, relist it after this transaction with the Clermonts? [125]

A. Oh, I don't remember exactly.

Q. Can you give us some idea, some approximate time, please, as to when you relisted this property for sale?

A. Well, as nearly as I can remember, it was, oh, I would say along in July after I decided that they would rather have their money back and didn't want the property.

Q. So, that sometime in July, 1953, after the statement of defects had been furnished you, you relisted the property for sale with Mr. Hagarty, is that correct? A. Yes.

Q. And by relisting it, if an opportunity had presented itself to sell it in July, 1953, you would have then sold the property, would you not?

A. Well, to tell the truth, I hadn't decided. I had talked to my attorneys about it. They said, "If you get a chance to sell it, check with us and see what has developed by then."

Q. In relisting the property, what did you tell Mr. Hagarty you would take for it in July, 1953?

A. \$36,000.

Q. In other words, you told him, "If you have an opportunity to sell this property in July, 1953, for \$36,000, go ahead and sell it"?

Mr. Erickson: To which we object as argumenta-

(Testimony of Glenn Woodbury.)

tive, no foundation to support it as cross examination.

Court: Overruled. [126]

A. What was your question again?

Q. I said you in effect told Hagarty when you listed it for \$36,000, "If you can sell this property for \$36,000, go ahead"?

A. I told Mr. Hagarty the same as I have just told you, if he got a chance to sell it, I would check with my attorneys. If they said to sell it, okay, if they said not to, we wouldn't.

Q. Your attorneys previously told you if you had an opportunity to sell it, to sell it?

A. No, they didn't.

Q. But you did list the property with him?

A. Yes, under those conditions.

Q. When was it you first listed this property with Hagarty?

A. I can't answer that, I don't know the date.

Q. When was it with respect to June, 1953?

A. It was prior to that.

Q. How long prior?

A. I don't remember.

Q. Had it been listed for some period of time?

A. Some, I guess.

Q. Had you had any persons interested in it?

A. Well, there had been a few people look at it, yes.

Q. Had you had any people who went to the extent of making any payment on the property?

A. No.

(Testimony of Glenn Woodbury.)

Q. Now, at the time this Clermont transaction took place, Mr. [127] Hagarty was acting as your real estate agent? A. Right.

Q. You had employed him to sell the property and had agreed to pay him five percent commission to do so? A. Yes.

Q. And in all of the Clermont transaction, Mr. Hagarty was acting in that capacity, as your real estate agent? A. Yes.

Q. Now, in your testimony this morning, you were relating conversations which had taken place with the Clermonts on May 2, 1953, is that correct?

A. That is correct.

Q. Had you seen the Clermonts prior to that time? A. No.

Q. Do you know whether or not they had been to your ranch prior to May 2, 1953?

A. I know they said they had.

Q. When they came to the ranch on that day, who were they with?

A. Well, they were with Mr. Hagarty. I believe they were in their car and he was in his, as I recall it.

Q. So that there were the two Clermonts present and Mr. Hagarty and yourself? A. Yes.

Q. And was your wife present at that time?

A. No.

Q. Now, where did you first see them on that day?

A. As I stated this morning, it was down in the corner of a field I was planting to peas.

(Testimony of Glenn Woodbury.)

Q. Isn't it a fact that after they met you there, the discussions that were had concerning this property actually took place up at your house?

A. No.

Q. You mentioned that one other man was present?

A. That's right.

Q. He was a man who was working for you at the time and was driving a tractor, wasn't he?

A. That's right.

Q. Isn't it a fact you purposely directed the conversation so that all of you left where he was and didn't talk about the negotiations at all until you went to your house?

A. No, that is not a fact.

Q. I see. It is not a fact?

A. No.

Q. At that time in the conversations you say that you told Mr. Clermont certain things about your property?

A. That's right.

Q. I take it Mr. Hagarty was present during all that conversation?

A. Yes. [129]

Q. He was an interested party in the matter, wasn't he?

A. Yes, you bet.

Q. So, at all the times and during all the conversations on May 2nd that you related this morning, Mr. Hagarty was personally present?

A. Yes, he was there.

Q. Now, then, as I understand it, the first thing, or one of the first things you told Mr. Clermont was that you had the place under a contract with Jannsen?

A. That's right.

(Testimony of Glenn Woodbury.)

Q. That was said in Mr. Hagarty's presence, wasn't it? A. Yes.

Q. You also told him, according to my notes here, that the Clermonts would have to assume that contract which you had with Jannsen?

A. That's right.

Q. That also was in Hagarty's presence, wasn't it? A. Yes.

Q. Also, you told him, according to your testimony this morning, you owed Jannsen approximately \$16,000 on that contract of sale?

A. That's right.

Q. And that too was in Hagarty's presence, wasn't it? A. Yes.

Q. Now, then, there was other conversations before the contract [130] was signed about the Jannsen contract? A. That's right.

Q. Several statements by you, is that true?

A. Well, there was some, anyway, I don't know what you call several.

Q. Well, you said after they had left, a couple hours later they came back, and again you had told them.

A. That is when they came back to complete the deal.

Q. That you had told them about the Jannsen contract again? A. Yes.

Q. That again was in Hagarty's presence, wasn't it? A. Yes.

Q. So that all the conversations that concerned the Jannsen contract were in Hagarty's presence?

(Testimony of Glenn Woodbury.)

A. Yes.

Q. And after all the conversations and negotiations, the contract was prepared, was it not?

A. Yes, yes.

Q. It is true, isn't it, Mr. Woodbury, that all of the writing on the contract that appears in the blanks was put in there by Mr. Hagarty, with the exception of the signatures? A. Yes.

Q. And, of course, in preparing that contract, he was acting as your real estate agent?

Mr. Erickson: I am going to object to that, the facts [131] speak for themselves here, your Honor.

Court: Yes, it has been admitted that that is a fact.

Q. Now, I am handing you an executed copy of that agreement which has been attached to the complaint and admitted in the answer. I will ask you to examine it and tell us if your previous statement is correct that all of the writing on that contract is Mr. Hagarty's with the exception of the signatures by the Clermonts and with respect to the signatures of the Woodburys?

A. Well, as far as I know it.

Mr. Boone. We now offer in evidence Plaintiffs' Exhibit 3.

Mr. Erickson: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 3, being carbon copy of Receipt and Agreement to Sell and Purchase, was here received in evidence, and will be cer-

(Testimony of Glenn Woodbury.)

tified to the Court of Appeals by the Clerk of this Court.)

[See Page 260.]

Q. That contract was written out in your presence, Mr. Woodbury?

A. I was in the room, yes.

Q. Also in the presence of Mr. and Mrs. Clermont? A. That's right.

Q. And were you the first one to sign it?

A. I don't remember that.

Q. You don't have any recollection which one signed first? [132] A. No, I don't.

Q. At any rate, did you read it before you signed it? A. I don't know that I did.

Q. Your memory seems to be good about other circumstances that took place at the time this transaction took place. Is your memory not good as to whether or not you read that agreement?

A. No, it is not good as to whether I read it or not. I guess we all have lapses of memory once in awhile.

Q. Now, you saw in here that the language used, "Payable in full to Mr. Woodbury, less about \$20,000 mortgage to Bernhard Jannsen," you see that language in there?

A. That is the reason I doubt if I read it, but I wouldn't swear I didn't read it. If I did, I overlooked that. I knew, Mr. Hagarty, we all knew it was a contract instead of mortgage because Mr. Hagarty sold the property, was right in the law-

(Testimony of Glenn Woodbury.)

yer's office when he drew it up as a contract instead of a mortgage, so I doubt I even read it. I might have read it and overlooked it. I wouldn't swear one way or the other.

Q. So, if you read the contract, you would see it was worded that there was a mortgage to Jannsen?

A. Well, I didn't notice it.

Q. Or you didn't read it at all.

A. One or the other, I wouldn't swear which.

Q. Now, then, you told the Court this morning that at the [133] time this contract was prepared, at first you didn't have the exact figure of the balance owing to the Federal Land Bank under that mortgage?

A. At what time did you say?

Q. When the contract was first prepared?

A. We had it when it was prepared, I think. When we first were discussing it in the field, we didn't have the exact figures. I can't keep figures too good in my head.

Q. Do I understand that before Mr. Hagarty started writing this contract you knew definitely how much the balance was to the Federal Land Bank?

A. Well, as I recall, I looked up my last statement from them and got it off of that.

Q. So, there was no occasion to put a balance of "about" so many dollars in the contract insofar as the mortgage to the Federal Land Bank was concerned?

A. Well, I might be mistaken, we might have looked it up after. I don't know as I recall we

(Testimony of Glenn Woodbury.)

looked up the statement, I don't know, we might not have.

Q. Didn't you, as a matter of fact, before the contract was signed, look up in your records to see how much you owed Jannsen?

A. No, I didn't.

Q. I call your attention to the part of the contract, Mr. Woodbury, where under the title section, that the title will be [134] clear except certain encumbrances, first mortgage to B. Jannsen, \$16,200. Up above you give it as about \$16,500. Now, would that refresh your recollection that you did look it up?

A. It is very possible since you bring it to my attention that what we did was figure back to what I owed on the place when I bought it, subtract the amount of the Federal Land Bank loan from the total amount, and arrived at this figure. I am very positive we didn't look up the contract.

Q. Give that to me again, will you, please, I got lost in it.

A. We took the total indebtedness that I had on the place, subtracted the amount I owed the Federal Land Bank, and arrived at, maybe, \$16,200.

Q. Where did you determine the total indebtedness? Where did you have that?

A. I might possibly have had that in my head what I owed on it when I bought it.

Q. Then, I take it what you did was to say, "The total indebtedness on this place is \$19,763.98," is that what you did?

(Testimony of Glenn Woodbury.)

A. No, it was—let me see—we got the odd cents, I can assure you, from the Federal Land Bank loan, which was never even. As to just exactly how we come to that other conclusion, I don't know, because I hadn't owned the place very long at that time, and Mr. Hagarty and I might have figured out what he wrote on that contract after he wrote this. I believe there [135] was a little figuring done there and we decided it was \$16,200, subtracting the amount of the down payment.

Q. After that was determined, then this clause was put in, "Mortgage to B. Jannsen, \$16,200," is that right?

A. I guess.

Q. So, actually the mortgage to Jannsen appears twice in this contract, doesn't it?

A. It is written twice, I guess.

Q. Yes. Now, didn't you testify this morning that in your agreement with the Clermonts, they were to pay all of the 1953 taxes, except the water, including the water?

A. All the water, I don't remember about the taxes.

Q. You testified this morning they were to pay all of the 1953 taxes?

A. That is the way it run in my mind.

Q. You could be in error in that respect, Mr. Woodbury?

Mr. Erickson: I didn't hear the last question. May I have that?

Q. I said he could be in error in that respect.

A. I believe the way it was since you bring it

(Testimony of Glenn Woodbury.)

up, I told Mr. Hagarty they would have to pay all the water, but I would prorate the taxes with them. I am not positive about that.

Q. I call your attention to Paragraph 3 of the contract which says, "Seller shall pay all taxes and assessments for 12/12ths of 1953." Now, does that refresh your recollection [136] that that was what you agreed to?

A. No, that wasn't what I agreed to. That was what I agreed to down here, "Purchaser is to pay taxes and water." I guess it was all taxes and all water.

Q. So that provision here, you think, refers to all taxes and all water?

A. That is what it says, isn't it?

Q. It says "taxes," then brackets water, referring to water taxes. A. Water, right.

Q. Under this provision, you were to pay 12/12ths of the taxes for the year 1953?

A. I suppose that was the way it was figured out.

Q. Would you say now that is a correct recollection of what transpired at that time with respect to taxes?

A. The statement I made in regard to it this morning is still a correct statement of the facts.

Q. So that the conversations you related this morning with respect to taxes also were in Mr. Hagarty's presence? A. Yes.

Q. Now, as a matter of fact, Mr. Woodbury, didn't you and Mr. Hagarty, in the negotiations

(Testimony of Glenn Woodbury.)

with these people, characterize your relation with Jannsen as being that of a mortgage?

A. No, never.

Q. I see. Now, after this contract had been signed, and [137] before you had any further conversations with the Clermonts, did you have a copy of it? A. Yes.

Q. In other words, you got one copy of it and the Clermonts got a copy of it? A. Yes.

Q. And Mr. Hagarty kept a copy of it. Did you have occasion to read that contract?

A. Not that I recall.

Q. Would you say you did or did not read it?

A. I wouldn't say whether I did or not.

Q. And after you received that letter of June 11, 1953, did you read the contract then?

A. I did.

Q. And did you notice then that the matter with Jannsen was listed as a mortgage and not as a contract? A. Yes, I did.

Q. You understand there is a great deal of difference between a mortgage and a contract, Mr. Woodbury?

A. Yes, I know there is a difference.

Q. And did you, on rereading this contract, then did you write the Clermonts and say that a mistake has been made as to this situation with Jannsen, that that was listed as a mortgage and it should be a contract? A. No, I didn't. [138]

Q. Now, then, you testified this morning you had a further conversation after the deal was closed

(Testimony of Glenn Woodbury.)

with the Clermonts in your house, also on the road a little bit later when they were telling you they were having difficulty in getting their money out of Canada? A. That's right.

Q. Now, at the time of these negotiations, you understood that the Clermonts had come to Montana with 18 to 20 thousand dollars, somewhere in there?

A. I didn't know how much money they had.

Q. They told you if they were to pay \$18,000 down payment, they wouldn't have money to operate on? A. That's right.

Q. They proposed the payment be \$16,000?

A. That's right.

Q. And that would give them \$2,000 to operate on?

A. I didn't know how much it would give them. It would give them \$2,000 more than if they gave me \$18,000, I knew that.

Q. So that part you knew at that time?

A. Yes.

Q. You also knew at the time of these negotiations for the \$11,000 payment they were dependent upon the returns from the sale of wheat in Canada?

A. I didn't know it when they wrote the contract, I didn't know that. They said they had some money coming out of Canada [139] but I don't know as I knew exactly what it was for.

Q. You testified this morning, sir, that at the time that contract was prepared, you yourself had suggested that the date be June 15th.

(Testimony of Glenn Woodbury.)

A. Because they didn't know when they would get the money out of Canada, but it would be in a few days.

Q. From the sale of wheat?

Mr. Erickson: First I must object on the grounds his tone is argumentative and the question is argumentative, and he didn't testify to that conversation.

Court: I don't remember that testimony. Your objection is good, it is argumentative. If you want, challenge the record.

Mr. Rimel: I don't think it is relevant.

Court: Proceed.

Q. After the contract was made, they told you they had trouble getting the money from the sale of wheat? A. Or some kind of grain.

Q. They were asking for the time of payment to be changed so they could be sure and have the money available? A. That's right.

Q. You refused to do that?

A. No, I didn't refuse to change the time of payment; I refused to put it on a contract for them. I told them I would give them more time, but I didn't want to write a contract and [140] carry it. I wanted it by fall. I told them I would give them until fall if they needed it.

Q. There was one question asked you this morning at the start of your examination; there was one question asked you this morning, which I am going to repeat to you and repeat your answer, and I have taken this from the Court Reporter's records.

(Testimony of Glenn Woodbury.)

The question was this: "Did you have a legal title to that property?", and you answered, "I thought I did." What did you mean by that answer, Mr. Woodbury, referring to this property?

A. I mean I thought I did, just what I said.

Q. You thought you held legal title to it at the time of your negotiations with the Clermonts?

A. I thought I had merchantable title to it.

Q. And as this says, a legal title?

A. I thought I had a good enough title to sell it, or I wouldn't have been selling it.

Q. Now, with respect to the water. I want to go back to the conversation during the negotiations as to the water. Now, you, as I recall it, testified Mr. Clermont asked you how much was against the property, what were the charges for maintenance, is that correct?

A. Well, the way I remember putting it this morning, and the way I remember it, in the field he asked what the water cost per year, and I told him, and he asked if all of that was for [141] maintenance or if part was for construction. I told him part was for construction, I understood, but I didn't know how much of it.

Q. During your negotiations was there any statements made by Clermont as to his experience with irrigation districts?

A. Not that I recall.

Q. Do you recall any statements by him that he had ever owned a farm that was under an irrigation district? A. No, I don't recall any.

(Testimony of Glenn Woodbury.)

Q. This agreement here provides that the purchaser is to get half of the hay, one-third of the grain, and I think it is one-third, or one-half, one-third of the peas. That was the 1953 crop, Mr. Woodbury?

A. That's right.

Q. At the time of the negotiations, the hay was in, wasn't it?

A. Yes.

Q. And you were in the act of planting the peas?

A. Yes.

Q. The grain was also in, wasn't it?

A. Yes.

Q. And Mr. Clermont was not to get possession of the property until he had made the \$11,000 payment to you?

A. Mr. Clermont could have moved in that afternoon, if he wanted to. [142]

Q. My question was, your understanding with him was he was not entitled to possession until he made the \$11,000 payment?

A. I still say Mr. Clermont could have possession any day he wanted it. The house was vacant, the yards were vacant; nothing stopped him from moving in. He even discussed moving in and putting a garden there.

Q. You actually kept possession of the property from May 2nd of 1953?

A. I did.

Q. You harvested the crop, had it harvested?

A. I did.

Q. Did you keep all the crop yourself, sir?

A. I did.

Q. All of the hay?

A. Yes.

(Testimony of Glenn Woodbury.)

Q. All of the peas? A. Yes.

Q. And all of the grain? A. Yes.

Q. There has never at any time been any statement or accounting to the Clermonts or to their attorneys with respect to the crop which was raised in the 1953 season?

A. I have never received any request for it yet.

Q. Have you ever made an accounting to them?

A. No. [143]

Mr. Boone: That's all, sir.

Redirect Examination

Q. (By Mr. Erickson): Mr. Woodbury, when did you discuss that, please, about putting in the garden, was it prior to June 15th? A. Yes.

Q. How long prior?

A. A couple of weeks, I guess.

Q. In the discussion about possession, did Mr. Clermont or Mrs. Clermont express any reason why they weren't going to take immediate possession?

A. Well, they were working for this fellow down there at Frenchtown. The reason they didn't want to farm it themselves, they said it was too late for them to get started, get machinery, stock and everything. It was their desire to take possession in the fall, that is, actual farming possession. I told them I would rather have sold it outright so I wouldn't have to farm it again that year because I had more irrigating than I could do. That is when we discussed him coming up to do the irrigating for me.

(Testimony of Glenn Woodbury.)

Q. There was a discussion of him coming down and putting in a garden that year?

A. He talked about it.

Q. Was that done? [144]

A. No, they never come down.

Q. You have been asked by counsel about your statement this morning that you thought you had legal title. Did you ever have a deed from Jannsen?

A. There is a deed in escrow.

Q. Did you ever have any other instrument delivered to you than the contract for deed?

A. No.

Q. When you said you thought you had legal title to it, can you explain why you thought you had legal title to it? Do you know the difference between legal title and equitable title?

A. No, I guess I didn't understand the difference. I should probably modify the statement to the fact that I thought I had title enough to transfer it to someone else, my equity. That is really what I had in mind I was doing, transferring my equity in the contract with Jannsen, and Jannsen had agreed to furnish a good title to me, and the Federal Land Bank had approved title for a loan, so I considered my contract gave me legal title, enough anyway to transfer it to someone else.

Q. Was there ever any discussion between you and Clermont or his wife concerning what kind of instrument you were going to transfer this property to him by?

A. No, all that was ever said was that I was

(Testimony of Glenn Woodbury.)

going to assign my contract to him was the way I put it.

Q. Now, after all these matters happened, counsel asked you [145] at some length about whether you or anybody on your behalf had any communications with either the Clermonts or their attorneys regarding this property, and you answered as far as you knew, no further communication had taken place, and I hand you now a carbon copy of a letter dated December 23, 1953, addressed to Mr. Russell Smith of Smith, Boone and Rimel, having the typed signature "Leif Erickson" on it, and marked "Copy, Glen Woodbury." Looking at that, do you recall ever having seen it?

Court: Mark it first, counsel.

Q. I show you this letter which is marked as Proposed Defendants' Exhibit 3, and ask you if you recall having received a copy of that letter?

A. Yes, I received this, but maybe I was confused on the question that Mr. Boone asked me.

Q. We will go into that later. I want to find out about this now. A. I remember this.

Q. You overlooked that letter?

A. The way I thought the question was was from the time I got this registered letter, or from the time I sent the letter telling them I would have my attorneys check the abstract, until the time he filed suit is what I thought the question was.

Court: That is what the question was. [146]

A. This was after the suit.

Mr. Rimel: We object to Defendants' Proposed

(Testimony of Glenn Woodbury.)

Exhibit 3, your Honor, upon the following grounds: First that the letter is irrelevant; secondly that it is not the best evidence; we have the original here in our file; thirdly, that it is dated December 23, 1953, several months after commencement of this litigation; and lastly, on the general ground that it is correspondence between counsel with reference to a pending lawsuit and has no bearing upon the issues in the case.

Court: I don't see that it is material, counsel.

Mr. Erickson: The only materiality of it is in view of our pleadings that we are still ready, willing and able to perform.

Court: Well, I still don't see its materiality.

Mr. Erickson: It has some self-serving purpose. The only purpose in doing it, or offering it, the way the record now stands under cross examination of Mr. Boone, Mr. Woodbury has sat back during all this time without making any attempt to do anything to wind the deal up.

Court: It was with reference—as the witness pointed out, that was with reference from the time of the commencement of negotiations until the commencement of the suit that the questions had reference to. This letter wouldn't have any bearing on that. The objection is sustained.

Mr. Erickson: I will withdraw the offer. [147]

Court: Very well. Court will stand in recess until quarter after 3.

(10-minute recess.)

Q. Mr. Woodbury, why didn't you do anything

(Testimony of Glenn Woodbury.)

yourself from July 27th, the date you received the letter, on to the date of the suit, in connection with this title proposition?

A. As quick as I found out they had objection to the title, I turned it over to my attorneys. They said they would take care of it for me.

Mr. Rimel: Just a minute, object to any conversations with attorneys.

Court: Yes, the objection is sustained.

Q. Did you understand your attorneys were handling the matter?

A. Yes, they were going to handle it for me. I didn't have the slightest idea how much correspondence had been handled between them and other attorneys, and my instructions to them were to——

Mr. Rimel: This is objected to as a self-serving declaration.

Court: Sustained.

Q. Now, was there any other reason why you didn't do anything about it besides the fact your attorneys were handling the matter for you?

A. I didn't think there was anything wrong with the abstract, [148] and I figured there was \$16,000 still payable to Mr. Jannsen, and he had agreed to make good title, so I figured the \$16,000 would well cover any defects that might be in the title. While I didn't think there were defects, I figured still there was plenty of encumbrance against the place to cover them if there was.

Q. The original contract for deed between you and Jannsen, do you know where that is?

(Testimony of Glenn Woodbury.)

A. The original?

Q. Yes. You say you had some sort of escrow agreement.

A. There is one copy of the original in the Stevensville bank.

Q. You had your own original?

A. I had an original and Jannsen had an original, I guess. I don't know which was the original, but we all had a copy.

Q. Now, counsel called your attention to Paragraph 3 of the contract which says that seller shall pay all taxes and assessments for 12/12 of 1953. Did you ever have an agreement to pay the 1953 taxes in your discussions with Clermont?

A. No.

Mr. Erickson: That is all.

Mr. Boone: No further examination, your Honor.

Court: Very well, you may be excused.

(Witness excused.) [149]

PAT HAGARTY

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Your name is Pat Hagarty? A. Pat Hagarty.

Q. You are the Pat Hagarty to whom reference has been made in the proceedings so far?

A. Yes, sir.

Q. Where do you reside, Mr. Hagarty?

(Testimony of Pat Hagarty.)

A. At Stevensville.

Q. At present are you at Stevensville?

A. Yes.

Q. But for the last several weeks where have you been?

A. Been at Glasgow and Great Falls.

Q. And you appear here on subpoena, do you not?

A. Yes, sir.

Q. In coming here, you came from Glasgow?

A. That's right.

Q. Did you come here for the purpose of this hearing?

A. That's right.

Q. You are intending to return to Glasgow at its conclusion?

A. Yes, for a few days.

Q. Now, you are in the real estate business?

A. Yes, sir.

Q. At Stevensville?

A. Yes.

Q. How long have you been in business there?

A. About six years.

Q. And is your business rather extensive?

A. Yes, sir.

Q. Can you tell us a little about the volume of business you do down there?

A. I do about a half a million a year.

Q. And I am referring now to the Bitterroot Valley, what percentage of that has to do with Bitterroot transactions?

A. Up to this year it has been approximately 95 percent, but this year I have sold some ranches outside.

Q. What percentage of business in the Bitter-

(Testimony of Pat Hagarty.)

root that you do is connected with ranch properties?

A. One hundred percent, practically all ranches and farms.

Q. Have you bought and sold ranches in the immediate vicinity of the farm designated as the Jannsen place?

A. Yes.

Q. How extensively?

A. I think I sold on all sides.

Q. And in the immediate vicinity?

A. Yes.

Q. When you say "on all sides," do you mean ranches adjoining [151] it?

A. That's right.

Q. Are you acquainted with the plaintiff here, Mr. Clermont?

A. Yes, sir.

Q. Are you acquainted with his wife?

A. Yes, sir.

Q. Designated as Albert Clermont and Marguerite I. Clermont in the complaint, you are acquainted with both of those people?

A. Yes.

Q. When did you first meet them?

A. It would be on the first day of May, I believe.

Q. Of 19 what?

A. 1953.

Q. Where did you meet them?

A. I went down to a restaurant. A man there in the restaurant, Mr. Carson, called me up and told me they were down for lunch and were in the Bitterroot looking for a farm.

Q. You met them at the restaurant?

A. I went down and met them at the restaurant.

(Testimony of Pat Hagarty.)

Q. At that time was there any discussion between you and the Clermonts about the Jannsen property?

A. I asked him what kind of place he had in mind, how much money he had, how much he wanted to pay on the place. I told him I had a good place out there about 12 miles out of town; it had pretty good buildings on it, a pretty good farm, [152] that I could sell him for, I had it listed for \$38,000, and that there was an awful good contract on it; there was about \$18,000 there carrying three percent interest, payable \$1,000 a year.

Q. You are talking about—you were talking about the Jannsen place?

A. The Jannsen place, yes. So he become interested in this place and I took him out to look at it.

Q. And in that first conversation, when you referred to the contract, were you referring to what has been here designated as the Jannsen contract?

A. Yes.

Q. That was a contract between Jannsen and Woodbury? A. Woodbury.

Q. Now, when you took him out to look at it on that first trip, did you see the Woodburys?

A. No, we didn't go up to the Woodburys ranch. We went to the Jannsen place the first day.

Q. Who was along on that trip?

A. A man by the name of Hamill and his wife, I believe, of Frenchtown.

Q. They came with the Clermonts?

(Testimony of Pat Hagarty.)

A. Yes.

Q. Was anyone else there? A. No. [153]

Q. Now, what transpired on that day?

A. Well, we went out and went over the land and went through the buildings. Mrs. Clermont and Mrs. Hamill went through the buildings. We walked out over the land, and well, we spent approximately, I don't know, maybe about an hour around the place, walked up to the hay land and around at that time. Then, he told me he didn't know for sure where he wanted to locate, but I gave him the full price and the contract terms and everything, and naturally, I didn't know for sure if he was interested. We meet a lot of people that way, just lookers, you know, but he said they would think it over and come to see me in a couple of days.

Q. In that first discussion you mentioned contract terms. What was that discussion about?

A. Of course, I used that for a selling point, the three percent interest on the contract they were assuming. It was a very good selling point, this three percent interest, because, you know, most interest runs five percent.

Q. Did you then have specific reference to the Jannsen contract? A. At all times.

Q. Did you make that clear to Mr. Clermont?

A. Very clear, sir.

Q. Any discussion at that time about the water?

A. Yes. [154]

Q. What was that?

(Testimony of Pat Hagarty.)

A. He asked me where this water come from, and I told him it come from Como Lake. We talked about how far it was to Como Lake and how the water come down and all.

Q. Did you explain to him then that the water costs were charges against the land?

A. About \$4.00 an acre I think I told him.

Q. Did you explain to him that had to be paid with the taxes? A. Yes.

Q. At that time? A. Yes.

Q. Now, is there any further discussion on that first meeting you now recall?

A. Well, I don't recall. Mr. Hamill went out and looked at the land. He lived in the valley here for many years. He walked over the land, and he made the remark "This is good soil."

Mr. Rimel: Just a minute. We are going ahead with the conversations under the general objections, as I understand, but I don't think we should get into what Mr. Hamill said.

Mr. Erickson: I didn't intend to elicit that and ask that the last answer be stricken.

Court: Yes.

Q. When did you next see Clermont? [155]

A. I think it was two days later he came back. He came alone, him and his wife and children come the next time.

Q. Where did they come then, to your office?

A. Yes.

Q. What time of day was that?

A. Well, I think it was approximately about 10

(Testimony of Pat Hagarty.)

o'clock, maybe 10:30, between 10 and 10:30.

Q. What did you do then?

A. I took them out to the farm.

Q. Did you go back to the Jannsen farm itself?

A. Yes.

Q. At that time did you meet Woodbury there on the farm?

A. We saw Woodbury in the fields, so we went over and talked to him.

Q. Present at that conversation were Woodbury, Clermont and his wife and some children and yourself, is that correct?

A. That's right. Another man on a tractor was there, Mr. Briggs.

Q. Could that have been Roy Marie instead of Mr. Briggs?

A. I am not very sure. It comes to me now, I guess it was Marie. I didn't pay attention to him.

Q. Do you know who he was? I mean did he have some official reason for being out there?

A. No, just working for Woodbury on a tractor.

Q. It was a hired man of Woodbury's? [156]

A. I couldn't swear, really to be honest, I couldn't swear to it which one it was. I didn't have any conversation with him at all.

Q. You wouldn't remember? A. No.

Q. Some question has been raised by counsel. Do you recall any conversation between Woodbury and this man, whoever it is, to the effect that he should leave because there was a conversation going to take place? A. Oh, no.

(Testimony of Pat Hagarty.)

Q. Now, during this conversation that I am about to ask you about, did Mr. and Mrs. Clermont remain present?

A. They were all the time with me, yes.

Q. Tell us what the conversation was as it related to this matter now in dispute?

A. Well, of course, they were interested in getting Woodbury down some on the price. They wanted to get him down some on the price. We discussed it for quite a little while, and like Mr. Woodbury said first, I am very positive he asked me if Mr. Woodbury would rent the place, and we even asked Mr. Woodbury if he thought he might rent it for a year.

Q. What did Mr. Woodbury say to that?

A. No, he wanted to sell it and get his money out.

Q. Go ahead and tell us what the general conversation was.

A. Well, we talked about the price, and I told them, of [157] course, I said, "I have it listed for \$38,000. If you can do any better with Woodbury, it is all right with me." I told them that coming out. He then talked to Woodbury and tried to get him down in price. It was getting along to 11 o'clock at that time, or 11:30. At the time we didn't come to any complete agreement as to the price, and I told Mr. Woodbury, "Well, I'll take these folks into town and buy them lunch, and we will come back out after lunch and talk to you."

(Testimony of Pat Hagarty.)

Q. Was there, during that conversation, any discussion of the contract with Jannsen?

A. At all times.

Q. Having reference particularly to that day?

A. Yes.

Q. What was that conversation?

A. Well, how much he had to pay on that contract, what time of the year it come due, and what the interest was, and all to that effect.

Q. And was that discussed between the Clermonts and Woodbury and yourself? A. Yes.

Q. Was it referred to at any time as a mortgage? A. No, I made that mistake.

Q. I am talking about this conversation.

A. No, never as a mortgage.

Q. Was there any discussion at that time when you were with [158] Woodbury in the field about the water?

A. Yes, we talked about water, him and Mr. Clermont talked about water.

Q. Did you hear that conversation?

A. Yes.

Q. And did he make any inquiry as to the cost of water charged against the land?

A. I think it was discussed at approximately \$4.00 an acre, \$4.10, something like that. I think I told him \$4.00 an acre.

Q. Did you hear any conversation or any discussion about construction charges at that time?

A. Yes, it seemed to me like they did.

Q. Now, you testified—was there anything else

(Testimony of Pat Hagarty.)

in that conversation you now recall dealing with this general matter of the negotiations?

A. Well, I believe there was something mentioned that they didn't want to move on until fall, and, of course, I told him "You are entitled to a share of the crop if you are not going to move on until fall if you buy it now," and I did hear Mr. Woodbury's testimony here a minute ago regarding taxes. We write all of our taxes—that place was sold in May. Any taxes up through 1953 would have to be paid by Mr. Woodbury.

Q. Up to 1953? A. That's right.

Q. Now, you went to town with the Clermonts?

A. Yes, sir.

Q. Any discussions between you and the Clermonts on the trip to town and back at lunch time about the deal?

A. Yes, sure there was; there was conversation about how much we could get Woodbury down, and I told him it didn't make no difference to me. If he could have bought it for \$32,000, I would have got five percent commission. I told him I didn't think he would come down much and to try him for \$36,000, and Mr. Clermont seemed to be pretty well satisfied on \$36,000.

Q. Any discussion at that time concerning the contract with Jannsen?

A. Oh, we was referring to that at all times, how much the payments would be and the interest, that was my main selling point, that contract for

(Testimony of Pat Hagarty.)

three percent interest. You know, I wrote that contract, too.

Q. The contract with Jannsen?

A. Yes, sold him that place.

Q. When you say you wrote it, I understand some attorney wrote it, is that right? A. Yes.

Q. You came back out to the Woodbury place, is that true? A. Yes.

Q. A conversation then occurred in front of the Woodbury home with the Clermonts? [160]

A. In the car, yes.

Q. Mr. Woodbury was present? A. Yes.

Q. Can you tell us what that conversation was?

A. After we drove out, we were satisfied, they were satisfied they were going to take the place if Mr. Woodbury would come down in price to \$36,000 and give them half the hay, one-third of the grain, and one-third of the peas, and we drove up and Mr. Woodbury come out, and I told Mr. Woodbury, I said, "We have agreed to pay, if you let us, we will take it for \$36,000 and let him have one-third of the grain, one-third of the peas, and half the hay. I believe we can get Mr. Clermont to pay half of the taxes." So, Woodbury, he jumped at me right away. He said, "No, if Mr. Clermont buys this, he is going to pay all the taxes," so we talked about that a few minutes. Mr. Clermont agreed to purchase the place and pay all the taxes.

Q. You heard Mr. Woodbury's testimony that after that conversation, you went in the house, is that correct? A. That's right.

(Testimony of Pat Hagarty.)

Q. Was his testimony correct that you had agreed then, or they had agreed, to go ahead with the deal?

A. We sold it outside and went in there to draw up the papers in the house.

Q. When you went into the house, was there any discussion [161] of the Jannsen contract?

A. Oh, yes.

Q. Tell us what that was.

A. Well, we told him we would give him this contract, and I asked him if he wanted to go over the contract.

Q. You are referring to the Jannsen contract?

A. The Jannsen contract. He said, "No," he said, "I don't believe I would care to look over the contract now if that is the balance due on the contract," and I put it in \$16,200, the balance due on the contract, payable \$1,000 a year, three percent interest. That was the way he purchased the place. That is all Mr. Clermont was interested in.

Q. Did he look at the Jannsen contract?

A. No. I asked him if he wanted to look at it. He said, "No."

Q. Was there anything said at that time about the abstract?

A. No, I don't—well, yes, I believe Mr. Clermont brought up about the abstract, but anyway, I told him, "You have nothing to worry about the abstract. This man Jannsen got \$16,200 coming. If he can't give you an abstract, you don't pay him."

(Testimony of Pat Hagarty.)

Q. Was that said to Mr. Clermont?

A. Yes.

Q. It was said then, at that time?

A. Yes. [162]

Q. What was his answer to that?

A. It was all right with him.

Q. Was there ever at any other time any discussion about the abstract?

A. No, I don't believe so. Of course, you see, what we figured, we figured—on all my deals as a rule, we don't come out with the abstract on the first down payment——

Mr. Erickson: I believe that may be stricken.

Court: It is stricken. We don't care what you do on all your deals. We want to know what you did on this deal.

Q. Now, what further conversation took place there during the time the contract was being fixed up about what the deal was?

A. I didn't get that.

Q. Well, I wanted to get at the full conversation that took place at the time you were fixing up this contract, which was, in this case, in the house, and was there any further discussion about the Jannsen contract or the Federal Land Bank mortgage, or anything else?

A. No, we found out what balance was due on the Federal Land Bank mortgage, and approximately the balance due to Jannsen. It would have been—naturally if it was \$100 over or anything, he had agreed to buy the place for \$38,000, and he

(Testimony of Pat Hagarty.)

paid down so much money. That is all Woodbury could get anyway.

Q. You mean \$36,000? [163]

A. That's right.

Q. You heard Mr. Woodbury's testimony that he said to Clermont at the time that he wanted his money out?

A. That's right.

Q. To be out of the deal. Do you recall any conversation like that?

A. Yes.

Q. What was that conversation?

A. They talked about it and Woodbury told him he wanted all his money, but at that time Mr. Clermont didn't seem to be wanting it for any less; he seemed to have that much money.

Court: Let's take a little recess and maybe they will have this noise stopped. Court will stand in recess until quarter of four.

(10-minute recess.)

Q. Calling your attention again to the conversation you have been relating that occurred in the Woodbury house when this contract was fixed up, this contract or document is a printed form, is it not?

A. That's right.

Q. And it is a form generally used by you in your business?

A. Yes.

Q. Now, there is in the contract—I have forgotten the exhibit number of that—I think it is this document, it is Plaintiffs' Exhibit 3. I show you this instrument. You will [164] notice the language down there in the paragraph which is marked "2," "Contract for deed." You were the one that put

(Testimony of Pat Hagarty.)

that language in, were you not? Your answer is yes? A. Yes.

Q. At the time of this conversation was there anything said about when that contract for deed was to be prepared?

A. Whenever he come back with the money.

Q. What was the full discussion about that?

A. Well, he told, he said that he didn't know how long it would be, and then Woodbury asked—he kept on saying 10 days would be long enough, he would have the money by 10 days, so Woodbury told him he could have longer if he wished, so we agreed, I believe, on 30 days.

Q. And did you discuss the nature of the instrument you were going to prepare pursuant to that paragraph of the contract?

A. Assignment of the Jannsen contract.

Q. Was that specifically discussed?

A. Yes, sir.

Q. Just how specifically, what was said?

A. Well, when he come back with the money, then we would go down to an attorney, to Woodbury's attorney, and Mr. Woodbury then would give him an assignment of this contract which he was taking over, and that was really why I put contract for deed. He was just getting a contract for deed and he was assuming this contract for deed.

Q. You were the one that put the word "mortgage" in in reference to the Jannsen transaction, are you not, Mr. Hagarty?

A. Yes, I made the mistake. I should have said

(Testimony of Pat Hagarty.)

mortgage to the Federal Land Bank and contract to Jannsen.

Q. Was there any discussion with Clermont in which the Jannsen transaction was referred to as anything but a contract for deed?

A. Never in my presence.

Q. Was there any discussion with you and Clermont or you and Woodbury about this instrument at the time it was signed, particularly with relation to the matter of the mortgage to Bernhard Jannsen referred to there?

A. Repeat that, please, I didn't hear.

(Question read back by reporter.)

A. What do you mean.

Q. Did you discuss the use of the word "mortgage" in this instrument?

A. Never was brought up. I didn't know I had it in there until after this suit was brought.

Q. Now, you have heard the testimony as to the payment by Clermont of \$5,000 and that you received \$1,000 of that money, is that correct?

A. Yes.

Q. That was paid to you as part of your commission on the sale? [166]

A. As a rule, we take all of our commission, but I was sure of the deal, and I just figured I would take \$1,000, and as long as he was coming back in a couple of weeks, I would get the rest of the money. I should have taken it all.

Q. You did get \$1,000? A. Yes.

Q. You retained that \$1,000? A. Yes.

(Testimony of Pat Hagarty.)

Q. Your answer is yes? A. Yes, sir.

Q. Did you have any further conversation with Clermont after this deal was closed and the money was paid concerning this proposition, this land?

A. Yes, Mr. Clermont came back to see me in a couple of weeks later, I believe. He came back to the house to see me and as I recall, he came in. I thought he was there with the money ready to go to Hamilton to fix up the papers, you see. Instead of that, when he came back, he said he didn't think he would go through with the deal.

Q. Did he tell you that? A. Yes, sir.

Q. Who was present when he told you that?

A. Nobody. My wife wasn't home. He was all alone that day.

Q. Was anything further done at that time?

A. No. I told him to go out and see Mr. Woodbury. It was [167] all right with me if Woodbury wanted to give him his money back. It was all right with me, because I sold the place.

Q. You have testified you have been in the real estate business for sometime and handled a considerable amount of property in the Bitterroot. Had you been in the real estate business before that time? A. Five years in Miles City.

Q. Turning to May 2, 1953, what can you tell me as to the general value of Ranch properties in the Bitterroot?

Mr. Rimel: Objected to as being immaterial and irrelevant.

(Testimony of Pat Hagarty.)

Court: This is along the line—the loss that was sustained?

Mr. Erickson: Yes.

Court: Overruled.

A. Well, of course, the business fell off an awful lot now in sales. All realtors will tell you that there is few places selling, but the ones that sell are not getting the asking price they did before.

Q. With relation to May 2nd, would you say from your experience as a realtor and being actively engaged in the business, that the price of this Jannsen property fairly well reflected its valuation as of that time?

Mr. Rimel: Objected to as leading.

A. It went down considerably. [168]

Court: It shortens matters up considerably.

Q. You didn't answer the question. My question was, Mr. Hagarty, was the asking price or the price of the Jannsen property on May 2nd, would that generally reflect the level of prices then?

A. Yes, I would say.

Q. Now, since that time, what can you say as to the value of similar ranch properties in the Bitterroot?

A. Well, that would be a very hard question for me to answer.

Q. But with relation to May 2, 1953, are they up or down?

A. Naturally, we all know they are off 20 percent anyway.

Q. How much?

(Testimony of Pat Hagarty.)

A. Twenty percent, anyway.

Q. How do you know they are that much off?

A. For other places adjacent to this ranch I have sold for five or six thousand dollars under the listed price this last year.

Q. Was that the price listed in May, 1953?

A. Yes, back in there.

Q. Can you give us specific examples of places you have sold in the immediate vicinity?

A. I sold the place adjacent to this Jannsen farm we are talking about, the place adjoining him on the west. I had that listed for \$35,000 early in the spring, and I finally [169] sold it last fall for \$28,000.

Q. When you say it was listed, is that just somebody's idea of what they had hoped to get, or would that have been the fair value at that time?

A. You don't know. These prices owners put on there, of course, they are putting on too high prices, I know that.

Court: I don't think we need proceed any further with this, it doesn't mean anything.

Mr. Erickson: I am trying to elicit from the witness that the value of land is lower now.

Court: He says he has to sell at lower prices than the listed prices. That doesn't give us any information at all, no basis to find any fact.

Q. Have you bought and sold land in the vicinity of the Jannsen property at or around May, 1953?

A. Yes, I sold a 200 acre farm in there.

(Testimony of Pat Hagarty.)

Q. Have you had occasion to resell that farm since May, 1953? A. Yes.

Q. Can you tell us what the property sold for when you sold it around May, 1953?

Mr. Rimel: Objected to as irrelevant and immaterial.

Court: Sustained.

Mr. Erickson: May it please your Honor, in anticipation of the objections, I have gone in a little bit into the matter [170] of how I was going to prove the difference in value, and the general rule in Jones on Evidence, and also in the Cyclopedia of Trial Practice is that you may prove value of property by comparison between the sale price at a certain date and a later sale price, or by evidence of specific sales, or by expert testimony of the witness, and it is for that reason that I am asking to develop this line of testimony.

Court: Well, you haven't proceeded on that line at all. You have asked this man if he sold another farm somewhere near or adjacent to it, and he said yes that he sold it for more one time, or he is going to testify he sold it for more in 1953 than he could sell it for in 1954, I suppose. That doesn't fulfill the requirements.

Mr. Erickson: The rule is if you have evidence of sales of similar property in the immediate vicinity that you may then introduce it to prove value. I may not have laid a sufficient foundation.

Court: You may use it to show the qualification of the witness to testify as to value if you prove

(Testimony of Pat Hagarty.)

(Testimony of Pat Hagarty.)

that it is a similar piece of property, and the sale was conducted under the same general conditions. There is just no foundation for the testimony so far.

Q. Now, this piece of property you are about to testify to, what piece of property is that?

A. Which? [171]

Q. That you have sold?

A. That was the Cranz place.

Q. Whereabouts is it with relation to the Jannsen place?

A. Well, it borders it on the west.

Q. What is the nature of that farm?

A. Practically the same as the Jannsen place.

Q. Is it irrigated land?

A. I believe about the same.

Q. How much irrigated?

A. About 120 acres, I believe.

Q. Is it under the same ditch? A. Yes, sir.

Q. What are the improvements on it?

A. The improvements, I would say, are fair.

Q. How do they compare with the improvements on the Jannsen property?

A. Well, they had a new house on it; pretty well. Woodbury's outer buildings, barns, were much better than on the other place.

Q. So your testimony is that the property would be substantially or very much the same?

A. I would say.

Q. Now, when did you sell the Cranz place first?

A. I sold that in April, I believe, of 1953.

Q. And how was that sold, was it a forced sale,

(Testimony of Pat Hagarty.)

or did you [172] go out and sell it just as you did the Jannsen property?

A. No, no, just got it listed and sold it.

Q. To whom did you sell that property?

A. A fellow by the name of Rancier.

Q. Was it, were the terms of the sale measurably different than the terms of this sale?

A. A smaller down payment.

Q. Was it sold also on a contract for deed proposition? A. Yes.

Q. What was the price you sold it for in April, 1953?

A. I sold it in April, 1953, for \$28,000.

Q. In April, 1953? A. Yes.

Q. You said yes? A. Yes.

Q. Now, have you since sold that property again?

A. Yes, last fall.

Q. And you sold it then as agent of Rancier, is that correct? A. Yes.

Q. Was that a sale in the normal course of business? A. Yes.

Q. Do you know whether or not it was a forced sale so far as Rancier was concerned, that he was in distress or anything when the sale was made?

A. No, I wouldn't say that; no, I don't think so. [173]

Q. If it was, you wouldn't know anything about it, are you saying that?

A. Well, I wouldn't care to disclose.

Mr. Rimel: What was that last?

Court: He wouldn't care to disclose.

(Testimony of Pat Hagarty.)

Q. Did you offer that place for sale for any considerable period of time before it sold?

A. Yes, I had it quite a little while, approximately two or three months.

Q. Did you show the property to more than one buyer? A. Yes.

Q. How many about?

A. Probably eight or 10.

Q. You finally sold it, is that true?

A. Yes.

Q. What was the price you received?

Mr. Rimel: I didn't get the date of the sale.

A. I am pretty sure without checking into my books, I believe it was April, 1953, I wouldn't want to say for certain as to the exact date.

Q. That was the first sale? A. Yes.

Q. We are talking about the second sale. When did that occur?

A. About the 20th of November last year. [174]

Q. Of 1953? A. Yes.

Q. The witness indicates "Yes", Mr. Reporter. Now, for how much was it sold?

Mr. Boone: Objected to as incompetent, irrelevant and immaterial, no proper foundation having been laid.

Court: Sustained. He testified in the first place, counsel, to a general conclusion that the ranch, that the property he sold was similar to this other, but that kind of testimony, that expert testimony, should be based upon facts as to the kind of land, the situation of the land, what it raises. This calls for ex-

(Testimony of Pat Hagarty.)

pert testimony, a conclusion based upon facts that we can rely upon, not upon his general conclusion that it was the same. Then, he goes along further and says, "Well, I don't want to tell you the circumstances under which it was sold, I don't care to disclose that." So, we can't use it at all.

Mr. Erickson: I believe your Honor may have overlooked the fact I asked him how long he had it listed, how many people it was shown to. I think that might overcome his failure to disclose.

Court: I don't think it does. I wouldn't be interested in this sale under these circumstances, a failure to give us facts from which it could be reasonably found that these were similar pieces of land in the same locality, and the same [175] crops and so forth, and particularly then when he comes along and says there are some things in connection with the sale he wouldn't want to disclose to the Court. We can't consider it at all, so let's proceed to another matter.

Q. Mr. Hagarty, based on your experience in this business, you have already testified, I believe, that the values of property in the immediate vicinity of the Jannsen property, and by reason of your experience, you estimate to be down 20 percent over what they were in May, 1952, is that a correct statement? A. Yes.

Q. And is the market for similar ranches at the moment good, bad, indifferent, or what have you to say as to that? A. Not very good.

(Testimony of Pat Hagarty.)

Q. Is there much property moving down there?

A. Not very much, no.

Mr. Erickson: I wonder if I may have a few minutes, your Honor, to discuss with the witness the matter of these similar sales, because I feel they may be important to me. I thought I had all the information I needed from the witness, but apparently not. He has the facts for various other sales. I would like to take a look at them to be sure I haven't overlooked them.

Court: Very well, Court will stand in recess until quarter after four. [176]

(10-minute recess.)

Q. Calling your attention now, Mr. Hagarty, to the Jannsen property, based on your experience in the real estate business and the fact you have been down there for a number of years and are familiar with the area, do you have an opinion as to what the value of the Jannsen place is today compared with its value on the market in May, 1953?

A. I would say off about 20 percent.

Q. Just a minute, just answer the question yes or no.

A. Yes.

Q. What is your opinion?

Mr. Boone: Objected to on the ground the witness has not shown himself qualified as an expert.

Court: He has testified he has been in the real estate business down there buying and selling ranch properties to the extent of half a million dollars a year over a period of time of five or six years, and he has also testified generally that he is familiar

(Testimony of Pat Hagarty.)

with the market value of lands in the area. What further qualifications do you think is necessary?

Mr. Boone: I think, your Honor, that he has to base it on experience of other transactions, other sales, and so on. I don't think he can testify to the value with respect to one piece of property. It may be up or down with relation to other transactions he has handled.

Court: That is something you can cross examine him on, [177] but I think to qualify generally, I think that he has, of course, to possess, to show specific transactions, not to show the value of this property, but to show his knowledge of the property or properties generally and his familiarity with the market in the community. He can relate 50 or 100 sales, not to show the value of this property, but to show he has been selling property; but I think that the witness has qualified sufficiently to answer the question. The objection is overruled.

Mr. Erickson: That is the view I take, your Honor. I was really trying to qualify the witness by this discussion of other sales.

Court: Yes, you can show other sales just to the extent of showing he has dealt in property, not to prove the value of this property. You show those sales to show his experience, but when you start to introduce the evidence to prove the value itself, those specific sales can only be introduced under particular circumstances, and the details are important that were not disclosed here.

Mr. Erickson: If there is a question as to the

(Testimony of Pat Hagarty.)

qualification of the witness, the extent of his experience would indicate the degree of his qualifications.

Court: That's right. They can cross examine further on that line if they wish. Proceed.

Q. Mr. Hagarty, you heard Mr. Woodbury's testimony that he [178] had listed the property again, is that correct? A. Yes.

Court: He didn't answer that first question. He answered yes.

Witness: I was going to say about 20 per cent. That is what I was going to say.

Court: Is that an answer to the question? I am not sure. That answer was stricken at that point. Now you may answer the question.

Mr. Erickson: I believe the record will show he said yes, and I said then what is your opinion as to the value of the Jannsen place today as compared with May, 1953? A. About 20 percent.

Q. Off. A. Yes.

Q. You heard Mr. Woodbury testify as to his listing the property with you again, is that your recollection of the matter? A. Yes.

Q. About when was that?

A. Well, that was a couple of months, I imagine, a couple of months after he got into this deal, but I never did do much on it because the place was—I didn't know for sure if he could sell it or not.

Q. Did he express that view to you? [179]

A. Yes.

Mr. Erickson: That is all.

(Testimony of Pat Hagarty.)

Cross Examination

Q. (By Mr. Boone): How much real estate have you sold in 1954?

A. I have sold about \$225,000.

Q. How much did you sell in 1953?

A. \$480,000, approximately.

Q. You mentioned to us when talking about values in the Bitterroot today that prices were off about 20 percent of prices that were listed with you, is that right? A. That's right.

Q. In other words, you are basing that 20 percent on what people come in and list property for as to what you are able to sell it for?

A. That's right.

Q. So, your conclusion on depreciation in value is based upon the difference between the listing price and the selling price? A. That's right.

Q. And that is your sole conclusion and sole basis for your expression of your opinion here?

A. That's right.

Mr. Boone: We now move to strike all the testimony this [180] witness has given with respect to values, your Honor.

Court: I don't think the motion to strike is proper, but the witness' conclusion in the light of his testimony will be weighed.

Q. Now, you have mentioned that in your experience as real estate agent, you have been using the form of agreement which was used in this case?

A. Yes.

Q. And I take it that in handling real estate, too,

(Testimony of Pat Hagarty.)

Mr. Hagarty, you try to be cautious?

A. That's right.

Q. You, I assume, would want the parties to know, the seller and buyer, the terms on which the property is being sold and purchased?

A. That's right.

Q. And it is your desire in handling transactions like that one to make sure your contract or your agreement that you prepare reflects correctly the agreements of the parties?

A. That's right.

Q. And you do take care in drawing your contracts that way, I take it?

A. Well, I make a little mistake once in awhile like on that mortgage.

Q. But you use caution to try and see your agreements properly reflect the agreement of the parties?

A. That's right.

Q. I also take it in handling real estate transactions, you want to have people read contracts or agreements before they are signed?

A. They have that right, surely.

Q. You recommend that, don't you, to where they know what is in the agreement?

A. I generally always take the form out and give it to them, give each of them a copy to look over first before they sign it, as a rule.

Q. That is after the form is filled in?

A. Yes.

Q. I take it you followed that same practice in this particular case between the Woodburys and Clermonts?

(Testimony of Pat Hagarty.)

A. As I recall it, in the Woodbury case, I didn't have a typewriter with me that day, and I wrote that out in long hand, and I handed it to Mrs. Clermont. I can't say whether Mr. Clermont read the contract or not, but I handed Mrs. Clermont one, and I don't just recall at this time if I handed Mr. Woodbury a copy of that or not, to be positive.

Q. You do recall making that up in three copies, don't you? A. Yes.

Q. And you heard Mr. Woodbury testify that he got one copy? A. Yes.

And the Clermonts one copy, and you had a copy?

A. Yes.

Q. So, there were three copies of it. Now, isn't it your testimony now that you handed a copy to the Woodburys and a copy to the Clermonts to read before it was signed?

A. I just don't quite remember. As a practice that is the way I do, but I just don't quite recall there whether—I just can't remember for sure how I did that, but I remember Mrs. Clermont reading a copy of it, handing her one. I don't remember Mr. Clermont did.

Q. Do you remember handing Mr. Woodbury a copy and having him read it?

A. I will tell you, to be honest with you, I handed him a copy. I couldn't swear if he read it.

Q. You did hand him a copy?

A. I am positive I handed him a copy when I tore them out.

Q. Did he look at it? A. I couldn't say.

(Testimony of Pat Hagarty.)

Q. You are sure Mrs. Clermont read her copy?

A. Mrs. Clermont, yes, she went over hers. In fact, as a rule, I give them all copies then I read the contract over myself and let them follow, you know.

Q. In other words, you read it out loud to them?

A. Yes.

Q. Did you do that in this instance?

A. I believe I did, I would say. [183]

Q. So that the contract, as it was written out, and the same as it is today, it is your recollection you read that out in detail to the parties?

A. That is the way I generally always do. I am pretty positive it was that way.

Q. When you say you read it to them, would you say, Mr. Hagarty, that you read these parts here which have reference to the mortgage to Jannsen, you read that part too, and then this part down below about the mortgage to B. Jannsen, you read all of that, did you, out loud to them?

A. It seems like I read that.

Q. Yes, and as far as the parties were concerned, there were no objections raised by Mr. or Mrs. Woodbury as to anything you had read?

A. No, it was agreeable by all.

Q. And the same as far as the Clermonts?

A. Yes.

Q. After that had been read in its entirety to them, the four people, two couples, signed the contract?

Mr. Erickson: I am going to object to the form

(Testimony of Pat Hagarty.)

of the question because the witness' testimony isn't that positive.

Court: Overruled. He may examine him about it and determine whether it is positive or not. Proceed.

Q. My question was, after you had read it in detail to them, the entire contract, the two couples, the Clermonts and the [184] Woodburys, then signed.

A. Yes. I don't know which ones signed it first.

Q. But there were no changes made after you read it? A. No.

Q. No changes requested by either couple?

A. No.

Mr. Boone: No further examination, your Honor.

Court: Any redirect?

Redirect Examination

Q. (By Mr. Erickson): Mr. Hagarty, going to the matter of the value of the property down in the Bitterroot now as compared with 1953, Mr. Boone asked you if your conclusion that the property was down in value 20 percent was based solely on the difference between the value of it as listed with you and the price it would actually bring. Tell us just exactly what you meant by that statement.

Mr. Boone: Objected to as immaterial, your Honor.

Court: Overruled.

A. You mean the value of the place today in dollars and cents as to what it was valued at in 1953?

(Testimony of Pat Hagarty.)

Court: No, he means what did you mean when you said that is the method you used in arriving at your conclusion as to the values being down now as compared to May, 1953. [185]

A. Well, with the demand for places here a couple of years ago, you didn't have to come down in price in order to sell the place as much as you do now. People are more price conscious.

Q. Mr. Hagarty, maybe we could arrive at it quicker. You know about what lands generally would bring in 1953? A. Yes, I do.

Q. Now, by comparison to—speaking of all land in the general vicinity, and what it was bringing in 1953, through your sales experience, and your knowledge of real estate, can you tell us whether, in your opinion, those same lands, I mean lands generally, will bring a different price now than in 1953?

A. Most all the lands being sold is being sold for at least 20 percent less than in 1953.

Q. Than they sold for in 1953?

A. That's right.

Q. So that your opinion is not based solely on the listing, but based on your knowledge and experience?

A. Oh, no. You get a listing, you can't tell what they put on the listing.

Q. So, your opinion then is not based on the statement you made that you got your opinion solely because they were down 20 percent from what they were listed for? A. Oh, no. [186]

(Testimony of Pat Hagarty.)

Q. It is on your experience and knowledge of the general real estate picture in the Bitterroot Valley? A. That would be right.

Mr. Boone: I am objecting to the testimony of counsel, your Honor.

Court: Yes, it is leading.

Mr. Erickson: It is understood you can lead an expert.

Court: Yes.

Q. Mr. Hagarty, you testified as to reading the contract to the Clermonts and the Woodburys. Is it your testimony you did read it, or is it your testimony that you think you read it?

A. Well, it seems like I read it. I am in the habit of doing that, giving each one a copy and then reading it to them to see if there is any changes they want in it or anything. When we got through with this, why nobody complained.

Q. Can you say for certain that you did or did not?

A. I wouldn't want to say for exactly whether I read it or not.

Mr. Erickson: I believe that is all.

Recross Examination

Q. (By Mr. Boone): Your recollection is that you did?

A. My recollection is just as I said, that I thought I did, [187] but I wouldn't swear to it for sure.

Mr. Boone: That is all, Mr. Hagarty, thank you.

(Witness excused.)

Mr. Erickson: That is all I have, your Honor, except I might like to introduce one other witness as to values if the opportunity exists tomorrow, that is, if we are still here, but outside of that, the defendants rest. That is all we have.

Mr. Boone: I can assure the Court we will make every effort not to be here tomorrow.

Court: Any rebuttal.

MARGUERITE CLERMONT

one of the plaintiffs, recalled as a witness on her own behalf, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Mrs. Clermont, you have previously testified here today? A. Yes.

Q. And have you been in the courtroom during the testimony that was offered by Mr. Woodbury and Mr. Hagarty? A. Yes.

Q. Now, with reference to statements that they had made, first now with reference to statements by Mr. Woodbury, you heard him testify that there were conversations between you and him and Mr. Clermont with respect to this Jannsen property [188] with respect to there being a contract against the Jannsen property which you would be taking over, and that there was no mention made of a mortgage to Jannsen, I will ask you if there were any conversations in the negotiations with Mr. Woodbury where the situation with Jannsen was characterized as a contract with Jannsen, called a

(Testimony of Marguerite Clermont.)

contract or a contract for deed with Jannsen?

A. I can't remember hearing anything about a contract for deed. We were under the impression that it was a mortgage; it should have been a mortgage.

Mr. Erickson: May the answer——

Court: Yes, that portion of the answer referring to her impression may be stricken.

Q. Do you have any recollection that Mr. Woodbury told you he had a contract with Jannsen?

A. No.

Q. What did he tell you he had with respect to his relationship with Jannsen?

A. He said that we would carry a mortgage with Mr. Jannsen.

Mr. Erickson: I am going to now have to move to strike that question, no time or place is fixed and no foundation for the question.

Court: Well, it is a little late, but I will sustain it, and go back and fix the time.

Q. On what occasion when you talked to Mr. Woodbury about the [189] purchase of this property before entering into the contract, was it one or more occasions?

A. We spoke to him on one occasion only.

Q. Are you referring to one day or more than that?

A. We spoke to him in the forenoon on the Jannsen place, and then returned after having lunch in town with Mr. Hagarty and spoke to him again in the afternoon at his home.

(Testimony of Marguerite Clermont.)

Q. Is that the same day the contract was entered into? A. Yes.

Q. Was that the only day before the contract was signed that you had any conversations with Mr. Woodbury? A. Yes.

Q. About the purchase of this property?

A. Yes.

Q. Is it those conversations that your previous answer related to?

A. About this contract for deed?

Q. Contract with Jannsen?

A. Yes, that is the only conversations.

Q. So, as I understand it, in those conversations there was never any mention made of a contract with Jannsen? A. No.

Q. But there was mention made of a mortgage with Jannsen? A. Yes.

Q. Now, in those same conversations on that day, again referring [190] to the testimony of Mr. Woodbury, he testified that your husband asked him as to how the ranch was irrigated and how much was for maintenance and how much for construction charges. Now, was there any discussion with respect to maintenance charges and construction charges on the irrigation? A. No.

Mr. Erickson: To which we will object on the ground there is no foundation. It seems to me Mr. Clermont would be the only witness qualified to testify on that. There would have to be some showing she was in a position to have heard all the conversation. I don't think that is established.

(Testimony of Marguerite Clermont.)

Court: She can only testify with reference to conversations she participated in or heard.

Mr. Boone: I will put a preliminary question.

Court: Yes.

Q. Were you present, Mrs. Clermont, during all of the conversations that took place between Mr. Woodbury and your husband with respect to the purchase of this property before the contract was signed? A. Yes.

Q. Was there any mention made in those conversations or any inquiry by your husband as to what charges were against the property for maintenance and what charges were against it for construction?

A. No, because they are not words he would use in his vocabulary anyway. [191]

Q. In your previous experience farming, have you ever had occasion to be on a farm in an irrigation district? A. No.

Q. Have you ever had any connection with irrigation districts in your previous experience?

A. Never.

Q. How long had you and your husband been farming before May, 1953?

A. My husband a little longer than I, 32 years myself, 22.

Q. In that 22 years with your husband farming, there has never been any experience with an irrigation district? A. No.

Q. In that 22 year period, have you and your

(Testimony of Marguerite Clermont.)

husband lived and operated a farm in the United States? A. No.

Q. Now, again referring to those same conversations, the negotiations for the purchase of this property, was there anything said, Mrs. Clermont, about a lien being against the property in favor of the United States for irrigation district charges?

A. No.

Q. When this contract was prepared by Mr. Hagarty, as he has testified to, what did the people do before signing that contract, you and Mr. Clermont and Mrs. Woodbury and Mr. Woodbury?

A. You mean at the home of Mr. Woodbury?

Q. Yes.

A. I believe we came after lunch, so we went directly into the living room.

Court: Isn't this evidence we have already had?

Mr. Boone: About the reading of the contract I am referring to, your Honor. It wasn't in our case in chief.

Court: Well, proceed.

A. We went to the living room. Mr. Hagarty took a place at the head of the dining room table. Mr. Woodbury was practically ahead of him on the other side of the table; my husband was on the left of Mr. Hagarty; I was on the chesterfield across the room with Mrs. Woodbury.

Q. What did the people do before signing that agreement?

A. We did talk over a few of the details, and my husband mentioned that—"Now," he says, "I

(Testimony of Marguerite Clermont.)

may not have—you ask for \$16,500. I may have only \$16,000,” he said, “I want it to be put down like that on the paper,” and Mr. Hagarty raised his hand. He says, “Oh, well, if I were you, I wouldn’t worry about something like that, that would be straightened out, some little detail.” I don’t know what they were going to do. Maybe we should have looked into this a little closer.

Q. What did you do about reading the contract?

A. Mr. Hagarty did read the contract. [193]

Q. Out loud? A. Out loud.

Q. And after that did the parties sign it?

A. Yes. I took time to read mine, I believe a few minutes after he had spoken or read his, and I believe that Mr. Woodbury had a copy in front of him. He looked as if he was reading it as I was.

Q. Now, after this agreement—well, go back again to these conversations. Were there ever any conversations with Mr. Hagarty, either on the day this contract was signed, Mrs. Clermont, or the previous occasion when you had been up there a day or two before, were there any conversations in which Mr. Hagarty told you this property was subject to a contract in favor of Jannsen? A. No.

Q. Was there anything in those conversations with Hagarty with respect to a mortgage to Jannsen?

A. I believe he mentioned a mortgage, now, I can’t say for sure, but the word “contract for deed,” I don’t remember hearing it.

Q. Was there anything in those conversations

(Testimony of Marguerite Clermont.)

with him when he mentioned the property was subject to a lien for irrigation charges?

A. No, we knew nothing of it.

Q. Now, after the contract was entered into, there has been [194] testimony entered here that you went to Mr. Woodbury and told him you were having trouble getting your money out of Canada, and also testimony from Mr. Hagarty that you didn't intend to go through with the deal. Now, I will ask you if you did advise Mr. Woodbury that you were having trouble getting your wheat money?

A. Yes.

Q. Was there discussions about changing the date of payment?

A. No, they refused to make any further extension on the time, and in fact, we even asked them if they would be willing to return us all of our money or part of it, and wait to be sure we had our money, as we had received word recently, a few days later, from the Wheat Board stating that it was impossible for them to guarantee delivery of that wheat by the end of May, as they had given us reason to believe before.

Q. All right, now, after that conversation with Mr. Woodbury, did you then come to Missoula to make arrangements, financial arrangements for the money that would be necessary to meet this contract?

A. Yes, we did.

Q. And were you, on June 15th, ready and willing financially to make the payment which was required under this contract to the Woodburys,

(Testimony of Marguerite Clermont.)

\$11,000, if the title had been satisfactory?

A. Yes.

Q. Now, with respect to the statement by Mr. Hagarty that [195] you did not intend to go through with the deal, did you make that statement to him?

A. No, Mr. Boone, we didn't make that statement, and may I further say, I don't believe Mr. Hagarty—in fact, I know Mr. Hagarty wasn't in no condition——

Mr. Erickson: May I object to the answer as not being responsive to the question and a volunteered statement.

Court: Sustained.

Mr. Boone: The answer with respect to the denial of the statement is there?

Mr. Erickson: I didn't make objection to that.

Q. Mr. Hagarty testified, Mrs. Clermont, that while you were negotiating, and before you signed this contract, he got out the Jannsen contract and showed it either to you or to your husband?

A. Oh, no.

Mr. Erickson: Wait a minute. I must object to that because that isn't the testimony.

Court: I don't recall that counsel.

Mr. Boone: I am sorry, your Honor, but I very definitely have a recollection, and a note that "we looked over the Jannsen contract," Hagarty testifying, that he had the contract out.

Court: I don't recall it. I recall Mr. Woodbury

(Testimony of Marguerite Clermont.)

testifying with reference to the Jannsen contract being in his papers there. [196]

Mr. Boone: And also the statement that Mr. Clermont didn't want to look at it, that he testified to, your Honor. He testified he had the contract out and handed it to Mr. Clermont, but he didn't want to look at it.

Court: Let's check the record then on it. It doesn't jell with me at all.

Mr. Erickson: The question would still be objectionable because it states the contract was there.

Court: Yes.

Mr. Boone: That part I was mistaken in. Was there any conversation or statements by Mr. Hagarty asking Mr. Clermont if he wanted to look at the Jannsen contract?

A. I can't recall any conversation like that.

Mr. Boone: That's all.

Cross Examination

Q. (By Mr. Erickson): When was it you made arrangements in Missoula to get the balance of the \$11,000?

A. I beg your pardon, Mr. Erickson, we didn't need \$11,000 balance.

Q. What was the amount you needed?

A. We figured we would be short maybe between one and two thousand dollars, depending on how much grain was coming through [197] by the end of May.

Q. What were the arrangements you made in

(Testimony of Marguerite Clermont.)

Missoula so you had the balance on June 15, 1953?

A. The arrangement was with Mr. Hamill if we needed help to prevent us from losing our \$5,000 deposit. He didn't want see us lose it. We intended going through with the contract, but he told us——

Q. Just a minute, your conversation with Mr. Hamill is not proper here, Mrs. Woodbury, or Mrs. Clermont, I am sorry. What did you do after you made arrangements with Mr. Hamill? Did you communicate the fact to Mr. Woodbury that you had the money available?

A. No, at that time we had been refused even—how do we say—a meeting with Mr. Woodbury. He had turned his back on us when we asked for an audience.

Court: Just direct your answer to the question specifically. Is not the question "Did you make any effort to communicate that to Mr. Woodbury"?

A. No.

Q. And what was the date you had the money ready?

A. We could have that ready before the 15th.

Q. And did you communicate to your attorney that you had the money available before the 15th?

A. At the time we hired Mr. Boone to read the contract, or the abstract, I should say, because Mr. Hamill was willing to [198] help us, providing that the abstract and all the titles and all the papers concerning this property was clear.

Q. So, you did not, on June 15, 1953, have the

(Testimony of Marguerite Clermont.)

actual money in hand to pay Mr. Woodbury, is that the situation?

A. No, in regards that the abstract had not been read.

Q. Your answer is no, you did not have the money. A. Didn't have it right then, no.

Q. What was the last conversation you had with Mr. Woodbury prior to the time you wrote the letter of June 11th?

A. It was later, I believe, or just at the end of the second week of May.

Q. Where did that conversation take place?

A. On the hillside just inside his boundary gate of his own farm.

Q. Who was present at that conversation?

A. Mr. Clermont and I and Mr. Woodbury.

Q. Was the topic of this discussion the contract you had with Mr. Woodbury?

A. It was for an extension of time, or if they refused us an extension, would they give us part of our money back, or all of it and wait until we were sure of getting our money from our wheat and not have to impose, we figured, on our friends here in Missoula.

Q. Was anything said at that time about revamping the contract in any manner? [199]

A. I don't understand what you mean.

Q. Was anything said about rewriting the contract? A. No.

Q. In your various conversations with Mr. Woodbury after the contract was made, you indi-

(Testimony of Marguerite Clermont.)

cated to him you were having trouble about raising the money. Was anything said about waiting until June 15th and then drawing a new contract?

A. No.

Q. Never anything said to you or Mr. Clermont in your presence by Mr. Woodbury that when June 15th came, and you didn't have the money that you would work out a new contract? A. No.

Q. Did you overhear any conversation in which Mr. Clermont said to Mr. Woodbury in words to this effect: If I did that, I would just be depending on your word. Do you recall any such conversation?

A. You mean about extending the time?

Q. Yes.

A. I believe that Mr. Clermont asked him—yes, he did ask him for an extension, and he said. "Well," he says, "we will work out something."

Q. Woodbury said they would work out something?

A. He refused to put it in writing. We went there that day with the intention he would put it in writing.

Q. Your contention that Mr. Woodbury turned his back on you [200] and was adamant in the matter is restricted to the testimony you now give that he wouldn't write a written contract?

A. We understood he refused.

Q. Was anything said by Mr. Woodbury that his word was good? A. You mean he said so?

Q. Yes.

(Testimony of Marguerite Clermont.)

A. He said his word was all right, sure, you wouldn't say——

Q. Now, Mrs. Clermont, I just want an answer to the questions here. You have testified here pretty positively and pretty directly on this matter. Now, I want the whole story. Your conversation took place outside the gate at the time Mr. Clermont told Mr. Woodbury he didn't have the money, did he not?

A. Not at that time.

Q. That is, he didn't have the money at that time? A. Yes.

Q. And from that time on until suit was brought, did he ever tell Mr. Woodbury that you did have the money available and would go through with the contract if the title was proper?

A. From the time the suit was brought in?

Q. No, from the time of the last conversation with Woodbury when you told him you didn't have the money, did you then any time after that tell Mr. Woodbury that you did have the money?

A. That would be after the last conversation we had with him? Q. Yes.

A. No, we never saw Mr. Woodbury again. [201]

Q. Did you make any attempt to see him at that time? A. No, we felt rebuffed.

Q. Prior to the conversation outside the gate, did you have other conversations with Woodbury about having the contract modified, or being given time to pay?

A. On more than one occasion, I believe on two occasions we went to see Mr. Woodbury, and Mrs.

(Testimony of Marguerite Clermont.)

Woodbury, his wife, even drove into town with us to see Mr. Hagarty to see if we could work out some plan.

Q. But no plan was worked out? A. No.

Q. On each of those two occasions did you explain to Mr. Woodbury you were not going to be able to get the money together by June 15th?

A. Not on our own and without help.

Q. The reason you wanted the change is because you were having difficulty in getting the money, is that correct? A. Yes.

Q. Now, calling your attention to your testimony that you don't recall hearing Mr. Hagarty or Mr. Woodbury ever refer to the Jannsen transaction as a contract for deed, your testimony is that you don't recall ever hearing that transaction referred to in that way? A. Not as a contract for deed.

Q. How was it referred to? [202]

A. The word "mortgage" comes to my mind and opinion as the word used.

Q. Now, at the first meeting, do you recall whether Mr. Hagarty spoke of that as a mortgage?

A. Yes, I can say he called it a mortgage.

Q. Whereabouts did he say that?

A. This was on the Jannsen farm just near his field where he was planting peas.

Q. Is that the first reference made by Mr. Hagarty to the Jannsen transaction?

A. Yes, that was—no, the first day Mr. Woodbury was not there, just Mr. Hagarty and ourselves.

Q. Now, Mr. Hagarty testified in the restaurant

(Testimony of Marguerite Clermont.)

there was a discussion of how the property was held from Jannsen. You don't recall any such conversation?

A. We talked about the value of land, how the ditches operated, and small, I would say insignificant conversations that didn't pinpoint anything, just as an interested party would be inquiring about a farm.

Q. Was anything said at that meeting at the restaurant in Stevensville about the interest to be paid Jannsen?

A. We understood there was interest of three percent.

Q. Was that discussed to a considerable degree between you? A. No.

Q. You have no recollection at the first meeting that anything [203] was said about the Jannsen contract?

A. The word "contract" does not come to my mind at all.

Q. So, when you testified that the words "contract for deed" didn't come to your mind, you also mean the word "contract" doesn't come to your mind as well as the words "contract for deed"?

A. I believe that is what you call it, yes.

Q. Do you recall the testimony of Mr. Hagarty that the offer was made in the house to show you the contract for deed with Jannsen? I mean you recall his testimony?

A. Yes, I recall the testimony.

Q. Were you present during all of those conver-

(Testimony of Marguerite Clermont.)

sations so you would have heard anything Mr. Hagarty said during the time you were preparing the contract? A. Yes.

Q. What was the discussion, if there was a discussion, about the Jannsen transaction at that time?

A. As close as I can recall, we were to have a mortgage balance to Mr. Jannsen of \$16,000 at three percent interest.

Q. And how was that mortgage to be transferred to you, how were you to acquire the mortgage, or the interest in that mortgage?

A. I can't recall we went into that in detail.

Q. Was anything said about the assignment of the mortgage to you? [204]

A. I don't recall that either.

Q. Was anything said about an assignment at all?

A. I don't recall anything concerning an assignment.

Q. The contract on its face reads you were to have a contract for deed. Was that discussed?

A. No.

Q. What kind of instrument did you expect to get title under in this transaction?

A. We expected to have a straight mortgage with Mr. Jannsen and a Federal Land Bank mortgage.

Q. Who was going to have the deed to the property? A. We figured it would be Mr. Jannsen.

Q. Now, what is your recollection of the conversation about the water?

A. As far as I know, the only information that

(Testimony of Marguerite Clermont.)

we asked for was how much it cost per acre.

Q. And what was told you about that?

A. It was, I believe he said at the time that it was anywheres between \$3.80 and \$4.00, around there.

Q. Who told you that?

A. Mr. Hagarty was the first one that informed us as we asked that first day we were on the farm.

Q. Do you recall any conversation in which either you or Mr. Clermont were referred to the County Courthouse or water office to get details on that?

A. I don't remember any conversation of that kind.

Q. Did you make any investigation about that water?

A. No, we didn't, because we didn't consider that there was anything other than paying, we would pay approximately \$4.00 a year to have this water for irrigating. We never expected there was any cause to go down there.

Q. Do you recall any conversation about some of the water charge being paid off eventually?

Court: Is this proper cross examination, counsel?

Mr. Erickson: I believe so, because she has testified no conversation was had about the water. That is all her direct, and it seems to me on cross I can lead the witness, which I am doing.

Court: Very well, proceed.

A. State the question again, please?

Q. Yes. Was any conversation had about paying off any part of this water charge? By that I mean

(Testimony of Marguerite Clermont.)

did you discuss that part of it would eventually be paid out?

A. Are you referring to the lien?

Q. No, the water.

A. The yearly water charge?

Q. Yes. A. That is paid twice a year.

Q. You may have misunderstood my question. Was anything said about eventually part of this charge being paid off so it [206] wouldn't be so high in future years?

A. I didn't understand it that way.

Q. You don't recall any conversation?

A. No, I don't.

Q. Now referring to the actual signing of the contract that is here an exhibit, do you recall whether you signed that before the sheets were torn out of the book, or after?

A. That is a very difficult question to answer, I couldn't say that we did sign it before or after.

Q. You couldn't say? A. No.

Q. You observed, I think, in looking at your copy that it is a carbon copy, is that correct?

A. Yes.

Q. Do you recall whether Mr. Hagarty read all of the contract? A. Yes.

Q. And did he read, do you recall he read, for example, the language which appears in the contract, "All irrigation fixtures and equipment, plumbing and heating fixtures and equipment, including stoker and oil tanks, water heaters and

(Testimony of Marguerite Clermont.)

burners," and so forth, was that all read to you, the fine print?

A. It was all read if it was on that sheet— I beg your pardon, now, did he list all those articles there?

Q. Perhaps if I show you the contract, Mrs. Clermont, it would [207] be fairer to you.

Court: He is referring to the first printing after the first space there, you see.

A. That is right here indicating, your Honor, you mean right here?

Court: Right there.

A. As far as I can recall, Mr. Hagarty read this copy.

Q. How long did it take him to read it?

A. It is very hard to say.

Q. What do you remember?

A. Oh, I should judge it didn't take more than 10 minutes.

Q. You recall it took him about 10 minutes to read it?

A. It would take that.

Q. Now, referring to that paragraph number 2 there, where it speaks of contract for deed, you have already testified you weren't quite sure what that called for, is that your testimony, you didn't know just exactly what that was going to be?

A. I can't say we didn't know; we were sure it was the same thing as a mortgage. We have had mortgages in Canada, and that is the only term we really understood, and we figured it was the same way here and in this instance.

(Testimony of Marguerite Clermont.)

Q. So that a contract for deed, in your opinion, was going to be a mortgage under which you would have a mortgage payable to Jannsen, is that correct?

A. Yes. [208]

Q. You understood, did you not, Mr. Woodbury would be out of the transaction entirely after he had received his money? A. Yes.

Q. And that from then all of your transaction was going to be between Jannsen and yourselves and the Federal Land Bank, is that true?

A. Yes.

Q. You understood about the Federal Land Bank Mortgage? A. We knew that part, yes.

Q. You heard the testimony that Mr. Hagarty offered to show you the contract with Jannsen. Is it your testimony—do you recall that? A. No.

Q. And is it your testimony that he at no time offered to show you the instrument they had with Jannsen? A. No.

Q. Are you saying it didn't happen, or you just don't remember whether it happened or not?

A. I don't remember ever hearing of a contract being offered to us with Jannsen.

Q. Did you inquire any further as to the terms of the Jannsen transaction other than to learn the amount of annual payment and interest?

A. No, we believed that was covered right there in that contract we drew up that day. [209]

Q. Did you hear any discussion on the day of the contract, May 2nd, of the abstract?

A. No.

(Testimony of Marguerite Clermont.)

Q. You heard Mr. Hagarty's testimony as to his conversation with Mr. Clermont? You heard that testimony? A. Yes.

Q. Are you saying you didn't hear any conversations to that effect?

A. I heard nothing about an abstract being offered.

Q. Was anything said as to when you would get an abstract? A. No, not at any time.

Q. Do you recall anything about when the contract for deed, whatever it was to be that was to transfer the property to you, was to be completed and the whole transaction closed?

A. Repeat that again, please.

Q. Reference is made to a contract for deed here in which you were to get title, or whatever the instrument was to be. Was anything said at the house as to when that portion of the transaction was to be taken care of so the deal would all be closed?

A. He gave us to the 15th of June.

Q. Was anything said indicating you might pay earlier than that? A. No.

Q. So that the testimony of Mr. Hagarty and Mr. Woodbury that [210] your husband said to them that he might pay earlier if he got the money, that is not according to your recollection?

A. I can't recall that for myself.

Mr. Erickson: That is all.

Redirect Examination

Q. (By Mr. Boone): As I understand it, at the

(Testimony of Marguerite Clermont.)

time you talked to Woodburys when you knew you were having trouble getting your wheat money, you were only \$2,000 short of having enough money to make the \$11,000 payment? A. Yes.

Q. You came to Missoula, and when you came to my office, arrangements had been made to obtain the necessary money from friends? A. Yes.

Q. Did you, after the 11th of June, receive wheat money from Canada to where you had the \$11,000 and more? A. Yes.

Q. When did you receive that wheat money?

A. We received one payment at the end of May, and the balance the first week of June; I believe it was the first week of June.

Q. So that do I understand that when the 15th of June came, you had you own money to make that payment? [211] A. Yes.

Q. Now, with respect to this property, counsel asked you as to what you were to receive. I realize you are not familiar with legal terms, but was it your understanding you would receive this property subject to those two mortgages? A. Yes.

Q. To Jannsen and the Federal Land Bank?

A. Yes.

Q. And when you paid those two mortgages off, you would own the property? A. Yes.

Mr. Boone: That is all.

Recross Examination

Q. (By Mr. Erickson): Mrs. Clermont, when did you go to Canada in 1953? A. In 1953?

Q. Yes, after this deal?

(Testimony of Marguerite Clermont.)

A. We crossed the 7th of September.

Q. Did you come back that fall?

A. No, we never come back since until last Friday.

Q. You were not here in the United States when the complaint, which is dated October 3rd, was prepared, is that correct? A. No, we were not.

Q. Now, Mrs. Clermont, you testified on my examination that [212] you didn't have the money on June 15th without getting some money from Mr. Hamill. Now, you testified you did have your wheat money before June 15th, which is correct?

A. I beg your pardon, did I say we had it at all? I meant by that we had it to satisfy Mr. Woodbury's demand, but it wasn't necessarily all our wheat money. Some of that was coming from Mr. Hamill, if we needed it.

Mr. Erickson: Yes, that clears it up.

May your Honor please, I indicated to the Court my great desire to be done today, but it looks to me as though it is going to be very difficult to be done because I think there is one more witness for the other side, and obviously it is going to be necessary for us to have some rebuttal testimony, and because of the importance of Mrs. Clermont's testimony, if the Court is of the view we should adjourn for the day, I should like to do so with Mrs. Clermont.

Court: I would like to finish with her if we could. We have been going with her for the last 40 minutes.

Mr. Erickson: I don't anticipate asking any more questions, but because of the complete variance of

(Testimony of Marguerite Clermont.)

her testimony with the testimony of our witnesses, I might have overlooked something, so I would let her go, understanding I reserve the right to recall her.

Mr. Boone: May I ask her one or two questions?

Court: Very well. [213]

Redirect Examination

Q. (By Mr. Boone): Where were you June 15, 1953? A. Huson, Montana.

Q. When did you receive the final wheat payment from Canada? A. July 29, 1953.

Mr. Boone: That is all.

Court: Very well, you may be excused. Take the stand in the morning again if counsel wishes.

Mr. Erickson: I may not, I think I am through.

Court: Do you have some more testimony?

Mr. Boone: We have some, one further witness, your Honor.

Court: We have arrived at this point in the trial of this case where I do have something to say to all the parties concerned. That is simply this: I hope they have learned a lesson, the Clermonts and Woodburys and Mr. Hagarty. It seems to me if they spent a few dollars and hired a lawyer before getting into these difficulties, you would be way ahead. It seems to me if Mr. Hagarty would devote his time to selling real estate instead of trying to practice law, he would save his clients a lot of time, trouble, worry, money and expense. The idea of a person trying to draw contracts and giving advice, telling

him not to pay any attention—by his own testimony, “Oh, well, the abstract, that is simple”—I forget what words he used, but in other words, that it didn’t [214] amount to anything, that they had plenty of recourse. He doesn’t know what recourse they have, he doesn’t know. You understand the difficulties he was placing people in, his own clients as well as other people he was dealing with. It is a pretty serious thing. I hope all of you, both parties and Mr. Hagarty and all other real estate dealers, come to well understand that they have got to be careful. Lawyers spend their lives and great money educating themselves, and still they, with all the care that is exercised, make errors and mistakes and give poor advice sometimes, but with it all, surely, surely a person in the position of a salesman should not ever try to interfere with the lives and fortunes of people. Without regard to where the answer in this case lies, that much is obvious, that they had better hire lawyers before they get into difficulties, and that people who have no right should not be trying to advise persons with reference to legal problems. It is a serious matter. Court will stand in recess until 10 o’clock tomorrow morning.

(Whereupon, a recess was taken until 10 o’clock the following morning, November 30, 1954, at which time the following proceedings were had:)

Court: Call the next witness.

Mr. Boone: We were finished with Mrs. Clermont unless counsel——

taxes—" then there is a parenthesis—"water for 1953—" there isn't a close in the parenthesis there—no, your Honor, I am mistaken, there is no parenthesis on the original. I don't want to mislead the witness.

Mr. Rimel: Whatever it is——

Mr. Erickson: No, that is just the "4" going down.

Mr. Rimel: ——I think it speaks for itself, your Honor.

Court: Yes, just present it.

Mr. Erickson: I am wondering if counsel is now withdrawing his objection.

Mr. Boone: No, the objection is not withdrawn because [216] your statement to the witness was

MARGUERITE CLERMONT

one of the plaintiffs, recalled for further recross examination, [215] having previously been sworn, testified as follows:

Recross Examination

Q. (By Mr. Erickson): Mrs. Clermont, yesterday we discussed this agreement which is Plaintiffs' Exhibit 3, and there is on the exhibit "Purchaser is to pay taxes and water for 1953." Do you recall the discussion about that? A. No.

Mr. Rimel: We object on that question. It says "to pay taxes, parenthesis, water." I think counsel's statement was "taxes and water."

Mr. Erickson: Well, whatever the language is. I believe the exact language is "Purchaser is to pay

(Testimony of Marguerite Clermont.)

“taxes and water”, which is definitely not on there.

Mr. Erickson: Okay.

Court: Let me see it. It is just “tax” apostrophe “s” “water”.

Q. Calling your attention to this language in the contract, “Purchaser is to pay tax’s water 1953”, do you recall any discussion of that prior to the time the contract was signed?

A. No, not that I remember.

Q. Do you remember any discussion at all about who was to pay for the water in 1953?

A. I can’t recall and be specific; I know there was some.

Q. Do you recall whether there was any at the time the contract was signed?

A. No, I can’t recall that.

Q. Do you recall any discussion in the field at the Jannsen place about where the water came from to irrigate the land?

A. I remember hearing my husband ask where the water came from.

Q. Do you recall what the reply was?

A. I can’t remember the name of the lake; you mentioned it yesterday; so I can’t say. I heard the lake, you know, mentioned.

Q. Any reference made to the “Big Ditch”?

A. I just heard “Large Ditch, “Big Ditch”.

Q. Did you know which ditch it was?

A. No.

Q. Do you know whether or not in getting into the Jannsen place, particularly the place where Mr.

(Testimony of Marguerite Clermont.)

Woodbury lives, you cross the Big Ditch?

A. No.

Q. Do you recall in going to the Woodbury place you go along a ditch?

A. I remember now a large ditch, I believe, going in from, I think it is the west side; the Jannsen place likewise; and there was a large ditch I noticed on the left side as we drove along towards his home.

Q. Do you know whether that is the ditch from which the water comes for the Jannsen place?

A. No, I can't say I knew it; I might suspect so.

Q. You testified yesterday afternoon you went to Canada sometime in September. How long after you went to Canada was it before you bought this store you have spoken of?

A. We crossed on the 7th of September, and we bought that store the 15th of March of this year.

Q. And between the time you crossed and the time you bought the store, what line of endeavor was your husband engaged in?

A. He was working on a farm, a dairy farm.

Q. Mrs. Clermont, on the day the contract was signed, do you recall whether there was any discussion about going into a [218] lawyer to fix up the final papers?

A. I don't remember that at all.

Q. You said yesterday that Mrs. Woodbury sat with you on a couch while these transactions were going on?

A. Yes, a chesterfield, I believe.

Q. Are you quite sure about that?

A. Very sure.

Q. If Mrs. Woodbury testified she was out in

(Testimony of Marguerite Clermont.)

the kitchen doing dishes during the discussions, would you think she was wrong?

A. If she was——

Mr. Boone: We object to the question.

Court: Sustained.

Q. But you are very sure she was sitting on a chesterfield with you during the discussions?

A. I can't recall she left at any time.

Q. Now, to try to fix the time at which the contract was read, as you said it was read yesterday. Can you say now whether it was read before Mr. Hagarty tore the sheets out of the book to which there has been reference made, or afterwards?

Mr. Boone: Objected to as repetitious. Counsel inquired along the same line.

Court: It is repetitious—objection overruled.

A. I can't say for sure, I believe I told you yesterday.

Mr. Erickson: That is all. [219]

Mr. Boone: No further questions, Mrs. Clermont.

(Witness excused.)

ALFRED CLERMONT

one of the plaintiffs, recalled as a witness on his own behalf, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Mr. Clermont, were you present in court yesterday when Mr. Woodbury and also Mr. Hagarty testified? A. Yes.

Q. You were here in Court? A. Yes.

(Testimony of Alfred Clermont.)

Q. Now, referring to the testimony of Mr. Hagarty for the moment, you will recall that he testified to certain conversations with you and with Mrs. Clermont when you first saw him and went out to look over the farm. Do you recall that he testified to those conversations? A. Yes.

Q. He testified with respect to telling you and your wife about Woodbury having a contract with Jannsen on the property. Was there any statements by Mr. Hagarty that Woodbury had a contract with Jannsen? A. No.

Q. What did he say, Mr. Clermont, as to what Woodbury had [220] with Jannsen?

A. Well, he had, between the National Bank and Mr. Jannsen there was a \$20,000 mortgage.

Q. A \$20,000 mortgage? A. Yes.

Q. Now, referring to conversations which Mr. Woodbury testified to on the day you talked with him and on the day you signed this agreement, did Mr. Woodbury tell you that he had a contract with Jannsen? A. No.

Q. What did he say he had with Jannsen?

A. There was a mortgage with Jannsen and this Federal Bank.

Q. And the Federal Bank? A. Yes.

Q. Now, referring again to conversations with Mr. Hagarty, was anything said by Hagarty to you as to a lien on the water? A. No.

Q. In your conversations with Mr. Woodbury, was anything said by Mr. Woodbury that there was a lien because of the water? A. No.

Mr. Boone: That is all.

(Testimony of Alfred Clermont.)

Cross Examination

Q. (By Mr. Erickson): Mr. Clermont, did Mr. Hagarty discuss with you at the [221] first time you met the terms of the agreement between Jannsen and Woodbury?

A. Well, yes, the terms to pay this——

Q. Jannsen? A. \$1000 a year.

Q. And did he say what the interest was?

A. At Three percent.

Q. Now, in the conversations with Woodbury and Hagarty, was it your impression that a new contract was going to be drawn between you and Woodbury or that you were going to take over whatever contract or paper he had with Jannsen?

Mr. Boone: Objected to as improper cross examination.

A. No, I was going to take it——

Court: Just a minute. Sustained.

Mr. Erickson: If your Honor please, he has presumed to testify as to what was said about the agreement.

The Court: The direct examination has just been with reference to two conversations, as I recall it, directed toward two different matters.

Mr. Boone: That is correct.

Mr. Rimel: Whether or not there was a contract or mortgage.

Court: And second, what was said or done about the lien on the water.

Mr. Erickson: I was under the impression, your Honor, [222] particularly since the witness is one

(Testimony of Alfred Clermont.)

of the parties, that when on direct examination he testifies as to what his understanding of the nature of the instrument was, I would be entitled to develop the full conversation as to what the nature of the instrument was.

Court: He wasn't testifying as to what was the nature of the instrument, he was testifying with reference to the conversation. If you want to open it, I will permit you on cross examination to go into it a little, but we have already covered it.

Mr. Erickson: I am only asking for conversations. We haven't covered it from this witness.

(Question read back by Reporter.)

Court: Obviously that is clear out of line of the direct examination. I am going to sustain the objection. We can get right back into the whole case again if we go along that line. Limit your cross examination to the points raised on direct.

Mr. Erickson: Very well.

Q. You are saying now that at no time did either Mr. Hagarty or Mr. Woodbury refer to the Jannsen transaction as anything but a mortgage?

A. Yes.

Q. Now, with reference to the water, you said that at no time was anything said to you that the charge for water was a lien on the land, I think that is correct. Now, were there [223] discussions as to what charges were to be paid for water?

A. Yes, Mr. Woodbury said between three and a half or four, they would run in that price line.

Q. A year? A. Yes.

(Testimony of Alfred Clermont.)

Q. And was that discussed at some length between you Mr. Woodbury and Mr. Hagarty?

A. I don't remember. Like I say, that come through the taxes. I don't remember it throwed the lien, so much an acre on that, I never got it clear anyway that way like it is mentioned today.

Q. You don't recall you were told by either Mr. Woodbury or Mr. Hagarty that there was a charge against the land? A. No.

Q. Are you saying that wasn't said or you just don't remember?

A. Well, I can't say it was said really clear in my mind.

Q. And did you hear the testimony yesterday in which they said they told you the water came from the Big Ditch and that the Government had it, or something to that effect? A. Yes.

Q. And they said that, did they?

A. It seems to me they said that yesterday.

Mr. Rimel: Just a minute, I think the witness may have been confused.

Court: He said, "Yes, they said that yesterday."

Q. Do you recall they said that to you at any time during your negotiations?

A. Yesterday?

Q. No, what I am asking, Mr. Clermont, they said yesterday they had talked about the ditch being a Government ditch. Do you recall now that during the time you were discussing the transaction, the deal, with them there was any discussion about that?

A. No.

(Testimony of Alfred Clermont.)

Q. Are you saying there wasn't any discussion about the ditch being a Government Project?

A. No.

Q. You are saying there wasn't any?

A. No, there wasn't none.

Q. Now, do you recall whether there was any discussion about where you could find out in detail about the amount of the water charge and the project? A. No.

Q. Mr. Woodbury testified yesterday he told you you could get all the information at the courthouse or water office. Do you recall any such conversation?

A. It seems to me—you know, it is a little bit blurred to me, but it might come. Like I say, I have heard it a lot through the summer too with Mr. Shaffer too when I started working at those places, but right at the time being it wasn't clear to me. [225]

Q. At the time you were negotiating with Mr. Hagarty and Mr. Woodbury for the purchase of this place, you were employed on a farm, an irrigated farm, were you not? A. Yes.

Mr. Boone: Objected to as improper cross examination.

Court: It is, but proceed.

Q. You worked on an irrigated farm?

A. Yes.

Q. At Frenchtown? A. Yes.

Q. Do you know whether or not it was under a Government Irrigation Project?

A. Yes, he got it under through the summer like I say, as we went along.

(Testimony of Alfred Clermont.)

Q. How long had you worked there prior to the time you entered into these negotiations?

A. I was just beginning there, really.

Mr. Erickson: That is all, Mr. Clermont.

(Witness Excused)

Mr. Boone: The plaintiffs rest, your Honor.

PEARL WOODBURY

one of the defendants, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): You are Mrs. Glen Woodbury? A. Yes, sir.

Q. You are one of the parties in this action?

A. Yes, sir.

Q. Mrs. Woodbury, when did you first see the Clermonts?

A. The day they came to our house to sign up a contract.

Q. There has been reference to a conversation that was held in a field prior to the time the contract was signed. You weren't present at that conversation, were you? A. No, sir.

Q. Now, calling your attention to the time they came to your house, were you in the room during the time these negotiations were being carried on?

A. Not all the time, no, sir.

Q. Mrs. Clermont testified you sat with her on a chesterfield during all the time and didn't leave

(Testimony of Pearl Woodbury.)

the room, is that correct? A. No, sir, it isn't.

Q. Where were you?

A. I was in the kitchen part of the time.

Q. How much of the time did you spend in the room?

A. I went in and met the Clermonts and I went to the kitchen and they called me in the dining room to sign the contract.

Court: Counsel, I am not clear in my own mind that that is what the witness, Mrs. Clermont, said. As I recall her [227] testimony she was saying all of the time during the reading of the contract that Mrs. Woodbury was present.

Mr. Erickson: That isn't my recollection, but I will fix the time.

Court: First the time with reference to that, then we can find out from the record later.

Q. Yes. How much of the time were you in the—strike that. How long did these negotiations last in your house?

A. I imagine a couple of hours, probably.

Q. How much of that time were you in the room?

A. Oh, about a half-hour, I would say.

Q. Speak up just a little louder.

A. About a half-hour.

Q. Do you recall whether Mr. Hagarty read the contract during that time?

A. I didn't hear him read it.

Q. Now, with reference to the time you were supposed to have sat on the couch or chesterfield with

(Testimony of Pearl Woodbury.)

Mrs. Clermont, did you sit on the couch with her during that period of time at all?

A. What do you mean?

Q. During the two hours that these negotiations took?

A. When they first came in and I met them, I sat down there and talked to her a little while.

Q. Now, you signed the contract, did you not?

A. Yes, sir. [228]

Q. Can you tell me whether—what the condition of the contract was when you signed it? Did you sign more than once?

A. No, I didn't.

Q. Do you recall the condition of the contract when you signed it?

A. It was a book page laid there, and I went to the table and signed it.

Q. Are you saying that the sheets were bound in a book at the time you signed it?

A. Yes, sir.

Q. Did you yourself read the contract prior to the time you signed it?

A. No, sir, I didn't, I was busy.

Q. You relied on your husband in the transaction?

A. Yes, sir, I did.

Q. What were you doing at the time, or just prior to the time you came in to sign the contract?

A. I was in the kitchen washing dishes.

Q. Did you have to make any preparations before coming in?

A. I dried my hands, of course.

Q. You went right from washing the dishes to sign the contract?

A. Yes, sir.

(Testimony of Pearl Woodbury.)

Q. Did you hear any of the discussions leading up to the signing of the contract there at your house that day? [229]

A. For me to sign it?

Q. No, I mean any discussions between Mr. Hagarty, Mr. Clermont and Mr. Woodbury?

A. Not too much.

Q. Would you say what you heard was too fragmentary to be of much assistance?

A. Yes, that's right.

Q. After that time did you see the Clermonts again? A. Yes, sir.

Q. When did you next see either Mr. or Mrs. Clermont?

A. Mr. Clermont came to our house about two weeks later.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Did it concern this deal you had made?

A. Well, he came on the back porch, and he was stuck in the mud that day, and my son went and pulled him out, and they came to our house and had dinner, and then he was in the dining room talking about it. Mrs. Clermont and I were in the kitchen.

Q. Any discussion then about the contract or about the sale that you heard? A. No, sir.

Q. And when next did you see either of the Clermonts? A. About a week later.

Q. Who did you see then? [230]

A. Mr. Clermont.

Q. Did you have a conversation with him?

(Testimony of Pearl Woodbury.)

A. He came to the porch and wanted to know where my husband was.

Q. Were just the two of you there?

A. Yes, sir.

Q. Was there any discussion about the sale?

A. That is the day he wanted to know if I thought my husband would give him his money back.

Q. What was the rest of that conversation?

A. I said that my husband was an honest man, and he wondered if my husband would give him the money back.

Q. You say he wondered if your husband was honest?

A. I said I had said my husband was an honest man. He said he wondered if he would give him his money back. I said he would have to go talk to my husband.

Q. Did he give you any reason why he wanted his money back? A. No, sir.

Q. Was that the extent of the conversation that day? A. Yes, sir, I sent him on up the road.

Q. You sent him on up the road to see your husband? A. To see my husband, yes, sir.

Q. Did he return to the house later that day, or did you hear any part of the conversation between him and your husband? A. No, sir. [231]

Q. Did you have any further conversation with either of the Clermonts about this transaction?

A. No.

Q. Mrs. Woodbury, were you present at any conversation in which there was any discussion of the

(Testimony of Pearl Woodbury.)

contract with relation to its terms after the time it was made? A. Yes, I was.

Q. When was that?

A. The day we went in to see Mr. Hagarty?

Q. Who was present at that conversation?

A. Mr. and Mrs. Hagarty—I mean Mr. and Mrs. Clermont, my husband and I.

Q. Was that at your house?

A. We went in to see Mr. Hagarty. As we was coming out, I heard my husband tell him after the 15th he would make him a new contract.

Q. That discussion was with Mr. Clermont?

A. Yes.

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Rimel): Mrs. Woodbury, did you sign the contract, Plaintiffs' Exhibit 3, which I will show to you, without reading it?

A. I did not read it. [232]

Q. And yet you placed your signature on the contract below that of your husband?

Mr. Erickson: I believe the witness has already answered that she did.

Court: Yes.

Q. Is that correct? She nodded her head. Prior to signing it, did you determine it had been read by your husband?

A. I didn't know for sure. Like I say, I was in the kitchen.

(Testimony of Pearl Woodbury.)

Q. Did you ask your husband if he had read it before you put your signature on it?

A. I don't ask my husband if he does things.

Q. You just signed it without either reading it or determining if he had read it?

Mr. Erickson: She has answered the question, your Honor.

Court: Yes, yes, she has.

Mr. Rimel: That is all.

(Witness Excused)

Court: Call the next witness.

GLENN WOODBURY

one of the defendants, recalled as a witness on his own behalf, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Mr. Woodbury, you testified yesterday, did you not? [233]

A. I did.

Q. And you have been present here during the testimony of both Mr. and Mrs. Clermont, have you not?

A. That's right, I have.

Q. Now, with reference to the conversations concerning the Jannsen transaction, did you at any time ever refer to the Jannsen transaction as a mortgage?

Mr. Boone: That is objected to as improper rebuttal.

Court: Well, in a way, yes, the rebuttal was that he had referred to it as a mortgage and not as a contract, but he has previously testified that he re-

(Testimony of Glenn Woodbury.)

ferred to it as a contract and not as a mortgage.

Mr. Erickson: I have some additional questions I wanted to ask him, and this is preliminary.

Court: Very well, proceed.

Q. The question again, please?

(Question read back by Reporter.)

A. I did not.

Q. Why didn't you ever refer to it as a mortgage?

A. Because I always thought of it as a contract.

Q. Did you have a copy of it? A. I did.

Q. Had you read that copy? A. I had.

Q. And that instrument was prepared by an attorney, was it not? [234] A. That's right.

Mr. Boone: We object to this as improper surrebuttal. It is just repetitious of what he said on direct examination.

Mr. Erickson: I am not sure whether this is surrebuttal or whether it is rebuttal. I don't know it makes any difference.

Court: All of this testimony so far is already in. I think the whole thing is there.

Mr. Erickson: My position in the matter probably is—I thought it was correct—but we have a situation here where the Court is forced on some of these matters to decide which of the witnesses is telling the truth.

Court: Yes.

Mr. Erickson: And you have a situation where the plaintiffs have come in now—I guess it is surrebuttal—the plaintiffs have come in and categori-

(Testimony of Glenn Woodbury.)

gorically challenged the truth of the witness and his memory, and it seemed to me in view of their testimony I would have the right to be sure this witness hasn't now changed his position by being reminded of something he may have overlooked before.

Court: On that basis we will try the whole case again. You just keep going back explaining everything all over again. This witness has already testified that he had a contract with Jannsen, that it was prepared by an attorney, that he had a copy of it in his desk, that the offer was made at the time of [235] the conversation at the house to produce that. All that is here in the record.

Mr. Rimel: I was going to add, your Honor, it doesn't, in my opinion, assist the Court to——

Court: The surrebuttal here is designed to answer anything new that arose as a result of the rebuttal. Now, the rebuttal, as I understand it, didn't raise anything new at all, it just constituted a denial of some of the things that were testified to in the defense.

Mr. Erickson: I think that is correct.

Court: There was nothing new actually raised as far as I can see, but if you want to clear up some of those matters you think are not clear, why fine, let's go ahead and do it.

Mr. Erickson: That was the purpose.

Court: Just so we don't get too far afield.

Mr. Erickson: I don't intend to. I have notes

(Testimony of Glenn Woodbury.)

on three questions. Of course, one question often breeds several more.

Court: Yes.

Q. Was there an answer to the last question?

A. I think I answered it under protest.

Q. Not on your part, objection on the part of counsel? A. Yes.

Q. Now, at the time this instrument was signed by you and by the Clermonts—I believe this is a matter on which this witness has not testified. [236]

A. You are referring to this instrument?

Q. That instrument, yes, Exhibit 3. Do you recall the condition in which that instrument was at the time you signed it?

A. It was in Mr. Hagarty's form book that he has them in and carbon copies.

Q. Mrs. Clermont testified that was torn out and read to you, and my understanding was that that reading occurred before it was signed. Do you recall anything about the contract having been read aloud by Mr. Hagarty?

A. No, I don't recall it being read aloud at all.

Q. Did you read it before you signed it?

A. No, not that I recall.

Q. Do you recall reading the part he had written in? A. No.

Q. Was there any discussion at that time concerning the final form of agreement that was to be entered into?

A. I think I testified to that yesterday.

Q. I don't believe so, but what was it?

(Testimony of Glenn Woodbury.)

A. When they came with the additional \$11,000, we were to go to an attorney and make an assignment of my contract with Jannsen.

Mr. Erickson: I think that is all.

Court: Any cross examination? [237]

Cross Examination

Q. (By Mr. Boone): Mr. Woodbury, will you say definitely that Mr. Hagarty did not read this contract to all of you?

A. No, I don't believe I testified that yesterday, and I can't testify it today. I don't remember of him reading.

Q. So, you can't say today whether he did or did not read it? A. No.

Q. Are you definite that you didn't read it?

A. No, I couldn't swear I didn't read it, I don't recall reading it.

Mr. Boone: That is all.

Mr. Erickson: That is all.

(Witness excused.)

Court: Do you want a recess.

Mr. Erickson: Yes, if I could have a couple minutes.

Court: Court will stand in recess until quarter after 11.

(10-minute recess.)

Mr. Erickson: We have nothing further to offer. We rest.

Mr. Boone: Nor do we.

Court: What is the next move with reference to this?

Mr. Boone: We request time be allowed for the purpose of findings of fact and a memorandum to the Court. [238]

Court: Yes, how much time does the plaintiff need?

Mr. Rimel: Ten days or 20 days.

Mr. Erickson: Maybe I can assist in fixing the original time if I tell the Court my situation. I am going to be tied up in trials for the next couple of weeks.

Court: So 20 days would be all right so far as you are concerned?

Mr. Erickson: Yes, because I see no possibility of getting at it as far as I am concerned.

Court: Very well, if the plaintiffs will submit a memorandum together with proposed findings of fact and conclusions in 20 days, and how much time would you want?

Mr. Erickson: I would say 15 days.

Court: 15 days then for the defendant to submit his proposed findings and memorandum. I think you are all aware of the two or three propositions that we are going to be really concerned with. There is the proposition in the first instance, I suppose, on the admission of parol evidence, and then, of course, from the factual standpoint itself, there are two or three conditions that probably need some discussion. I might call to your attention the letter, Exhibit "D," particularly, Mr. Erickson, whether that letter fits in with the theory

upon which you have been proceeding. You see, explain that situation to me if it does. It is something in the light of the situation that existed when the defendant testified that he [239] went to the office of counsel for the plaintiffs, and then he went to see his attorney, and then came back and delivered the abstract. Offhand it occurs to me that that is more in keeping with the idea that the abstract was to be delivered prior to the payment, and so I want you to appreciate that those things do appear that way to me, and you had better straighten me out as to what you consider the real significance and meaning of that evidence.

Mr. Erickson: I am sure, your Honor, that the briefs will be plenty long, that the matters will be covered.

Court: That is fine, I don't mind that, the length of your brief in arguing and setting forth your position is fine. Satisfy yourself in the first instance, that is the thing. With reference to the law and the citing of cases, I will appreciate it if you just cite cases that are necessary, just don't cite me a whole list of cases themselves. Then we are faced with the proposition of reading all of those cases. If the point is made by one case, there is no necessity of citing 20, I don't think. However, I appreciate also sometimes cases are not just exactly in point, and sometimes you have to cite a number of cases to show the line of reasoning under those circumstances. I am glad to read all the cases. We try to make it a practice to read every case that is cited, so you will help us by

citing as few cases as possible. Anything further?

Mr. Rimel: Yes. May we have 10 days after defendants file their brief to file a reply brief.

Court: Yes. Very well, our next business is at two o'clock. Court will stand in recess until two o'clock. [241]

[Endorsed]: Filed March 31, 1955.

DEFENDANTS' EXHIBIT No. 1

United States Department of the Interior
Bureau of Reclamation
Bitter Root Project

Amendatory Contract between the United States of
America and the Bitter Root Irrigation Dis-
trict.

This amendatory contract, made this 16th day of September, 1948, under the provision of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, and particularly the Act of August 4, 1939 (53 Stat. 1187), together hereinafter referred to as the Federal Reclamation Law, between The United States of America, hereinafter referred to as the United States, acting for this purpose through William E. Warne, Assistant Secretary of the Interior, hereinafter referred to as the Secretary, and the Bitter Root Irrigation District, an irrigation district organized under the laws of the State of Montana, and having its principal place of business at Hamilton, Montana, hereinafter referred to as the District,

Defendants' Exhibit No. 1—(Continued)

Witnesseth that:

2. Whereas, the United States and the District entered into a contract dated August 24, 1931 in pursuance of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto and the Act of Congress of July 3, 1930 (46 Stat. 852), which contract was amended and supplemented by the contract of March 17, 1936 for the purpose of extending to the District the benefits of the [244] Act of Congress of August 26, 1935 (49 Stat. 799), said contracts being hereinafter referred to collectively as the Government-District contract; and

3. Whereas, said Government-District contract provided for (a) liquidating the bonded and other outstanding indebtedness of the District, (b) for the doing or causing to be done under the supervision of the Secretary, of such construction, betterment or repair work as in the opinion of the Secretary may be necessary to place the irrigation works of the project in good operating condition; and (c) for loaning of money to the District from time to time for the prosecution by the District of any construction, betterment or repair work that in the opinion of the Secretary may be needed to place the irrigation works of the project in good operating condition, and (d) for allotment to the District of funds appropriated by the Emergency Relief Appropriation Act of 1935 for use in betterments and repairs of the District's irrigation works; and

4. Whereas, the Government-District contract

Defendants' Exhibit No. 1—(Continued)

provides, among other things, for the repayment of all funds so used or advanced by the United States to the District within a period of forty years from the date of the first disbursement by the United States to or for the benefit of the District, with interest at four per centum (4%) per annum on the funds so used or advanced from the date of such use or advancement until paid, which interest after July 1, 1935, was payable only on funds advanced for liquidating the bonded and other outstanding indebtedness of the District; and [245]

5. Whereas, the District, as the duly authorized representative of the water users involved, desires to enter into an amendatory contract for the purpose of securing the benefits of the Act of August 4, 1939 (53 Stat. 1187); and

6. Whereas, the Secretary has determined that, in his judgment, the provisions of this amendatory contract provide fair and equitable treatment of the repayment problems involved and would be in keeping with the general purpose of the said Act of August 4, 1939;

Now, therefore, in consideration of the mutual and dependent stipulations and covenants herein contained, it is hereby mutually agreed by and between the parties hereto as follows:

Scope of Amendatory Contract

7. This amendatory contract supersedes and takes the place of the contracts between the United States and the District dated August 24, 1931 and March

Defendants' Exhibit No. 1—(Continued)

17, 1936, referred to herein collectively as the Government-District contract, and the Government-District contract shall remain or be effective only to the extent expressly provided in this contract: Provided, That the provisions of the Government-District contract which have been fully executed prior to the date of this contract shall remain unaffected by this contract, except as this contract expressly provides otherwise.

Definitions

8. The term "accrued interest" as hereinafter used in this contract, shall mean all interest which has become due under the [246] Government-District contract but has not been paid to the United States by the District as of the effective date of this contract, including \$43,247.81 merged with and added to the principal in accordance with the Act of August 26, 1935.

The term "unaccrued interest" as hereinafter used in this contract, shall mean all interest provided to be paid by the District to the United States under the Government-District contract, but which has not become due as of the effective date of this contract.

The term "unaccrued balance" as hereinafter used in this amendatory contract in relation to obligations of the District to the United States, means that portion of the principal indebtedness of the District to the United States under the Government-District contract which has not become due

Defendants' Exhibit No. 1—(Continued)
and payable prior to the effective date of this contract, including instalments or parts of instalments of such indebtedness with accrued interest thereon deferred under the Act of May 31, 1939 (53 Stat. 792), as extended.

The term "delinquent balance" as hereinafter used in this amendatory contract, means that portion of the principal indebtedness of the District to the United States which has become due under the Government-District contract but has not been paid to the United States by the District.

The term "irrigation works" means the canal and lateral system, reservoirs and all other structures and property of the District. [247]

Cancellation of Accrued and Unaccrued Interest

9. All obligations of the District to the United States for accrued interest and unaccrued interest are hereby cancelled, subject to the provisions of Article 30 hereof. All penalties due the United States from the District and unpaid on September 30, 1947, are hereby cancelled and waived.

Credit to the District for Payments Made

10. The amount of two hundred forty-five thousand seven hundred twenty-five and 81/100 dollars (\$245,725.81) which has been paid by the District to the United States under the Government-District contract, is hereby credited in full on the District's principal indebtedness thereunder regardless of

Defendants' Exhibit No. 1—(Continued)

whether the payment made was for interest due or for application on the principal indebtedness.

Extension of Payment Period; Time of Payment
and Amount of Annual Instalments

11. The unaccrued balance and delinquent balance of the District's obligation to repay the United States under the provisions of the Government-District contract, plus the sum of \$5,100.00 to cover expenses of the United States to September 30, 1947 in connection with this contract, are agreed to total seven hundred seven thousand fifteen and 24/100 dollars (\$707,015.24) as of September 30, 1947, which amount, reduced by any further payments made by the District to the United States under the Government-District Contract prior to the effective [248] date of this contract, shall be referred to hereinafter as the "contract obligation" and shall be paid by the District to the United States, in successive annual instalments, due and payable on or before July 1 of each year beginning with July 1, 1948, or as soon thereafter as this contract becomes effective. Until said contract obligation is paid in full, each of said annual instalments shall be in an amount determined by increasing or decreasing, pursuant to the provisions of Article 12 hereof, the sums herein set out for the respective year as follows, except the sum due for 1948 which shall not be so increased or decreased and shall be paid in the exact amount of \$16,665.00:

Defendants' Exhibit No. 1—(Continued)

1948	\$16,665.00
1949	16,665.00
1950	16,665.00
1951	16,665.00
1952	16,665.00
1953	16,665.00
1954	16,665.00
1955	16,665.00
1956	16,665.00
1957	16,665.00
1958	16,665.00
1959	16,665.00
1960	16,665.00
1961	16,665.00
1962	16,665.00
1963	16,665.00
1964	16,665.00
1965	16,665.00
1966	16,665.00
1967	16,665.00
1968	16,665.00
1969	16,665.00
1970	16,665.00
1971	16,665.00
1972	16,665.00
1973	16,665.00
1974	16,665.00
1975	16,665.00
1976	16,665.00
1977	16,665.00
1978	16,665.00

Defendants' Exhibit No. 1—(Continued)

1979	16,665.00
1980	16,665.00
1981	16,665.00
1982	16,665.00
1983	16,665.00
1984	16,665.00
1985	16,665.00
1986	16,665.00
1987	16,665.00
1988	16,665.00
1989	16,665.00

and sixteen thousand six hundred sixty-five dollars (\$16,665.00) for each year after the year 1989 until the said contract obligation is paid in full: Provided, That the last of said instalments, that is, the instalment completing the payment of said contract obligation, shall not exceed the sum necessary to make the total of said instalments equal the said contract obligation.

Determination of Annual Instalments

12. Each annual instalment provided in Article 11 hereof (except for 1948) shall be determined by increasing or decreasing the sum set out for the respective year in said article as follows:

(a) The area of irrigable lands within the boundaries of the District is agreed to be 16,655 acres, as described on Exhibit "A" attached hereto and made a part hereof, and for the purpose of this article said lands shall comprise the "project contract unit".

Defendants' Exhibit No. 1—(Continued)

(b) Each calendar year during the term of this contract, the Secretary shall determine or estimate the "annual returns", and shall determine the "normal returns" for the project contract unit and shall determine the "parity ratio" to be applied. "Annual returns" means the amount of the gross crop returns per acre of the area in cultivation within the project contract unit for any calendar year. The "normal returns" shall be determined by taking the weighted average of the "annual returns" of those ten calendar years, of the thirteen-year period covering the calendar year for which said normal returns are being determined and the twelve calendar years preceding it, in which the annual returns for such years are the highest: Provided, that an estimate of annual returns may be used for the year for which the normal returns are being determined. The "parity ratio" shall be determined by dividing the average of the "Index of prices received by farmers" covering "Feed grains and hay" and "Dairy products" by the index of "Prices paid by farmers" covering "Commodities, interest and taxes", using the annual indexes as published by the Bureau of Agricultural Economics of the United States Department of Agriculture for the year for which the normal returns are being determined. If the issuance of such annual indexes is discontinued, the parity ratio shall be discontinued. The District and the water users thereof shall furnish the Secretary with such assistance as he requests, including the submission [251] of preliminary crop re-

Defendants' Exhibit No. 1—(Continued)

ports and estimates for the current year on or before July 1 of each year or such other date fixed by the Secretary, for use in the preparation of the estimates and determinations of annual returns and the determinations of normal returns and of parity ratio provided for in this article, and said estimates and determinations made by him shall be subject to adjustment the following year when the actual annual returns and parity ratio are known, and the said determinations by the Secretary shall be conclusive upon the parties hereto: Provided, however, that no adjustments shall be made unless the excess or deficiency of the actual amount collected amounts to more than ten cents (\$0.10) per acre. Written notice of this further final determination shall be furnished to the District by the Secretary on or before the third Monday of August of each year following the year for which such determinations are applicable and any necessary adjustment shall be added to or subtracted from the amount determined as provided in this article to be payable in the following year.

(c) Each calendar year during the term of this contract, the Secretary shall determine the per cent of the normal returns for said year by which the annual returns for said year exceed or are less than said normal returns. For each one per cent or major fraction of one per cent, there shall be an increase or a decrease, respectively, of two per cent in the sum set out for said years, as [252] provided in Article 11 hereof; and the said sum so deter-

Defendants' Exhibit No. 1—(Continued)

mined shall be further increased or decreased by multiplying it by the parity ratio as determined by the Secretary under subarticle (b) of this article: Provided, that in no event shall the amount of said instalment due for said year be less than fifteen per cent (15%) nor more than two hundred per cent (200%) of the sum set out for said year in Article 11 of this contract: Provided, further, that the last instalment payable by the District under the provisions of Article 11 hereof and this article shall not be in an amount greater than the amount necessary to complete payment of the contract obligation under Article 11 hereof. The Secretary shall notify the District of his determinations under subarticles (b) and (c) hereof on or before the third Monday of August of the calendar year for which such determinations are made. The instalment so computed for any calendar year shall be that payable by the District on or before July 1 of the following year.

(d) If at any time by reason of the operations of this article the contract obligation of the District has been reduced to an amount equal to or less than \$16,665, the unaccrued portion shall be paid on the due date of the next instalment without further adjustment under this article. [253]

Operation and Maintenance of Irrigation Works

13. (a) The District shall continue to operate and maintain the irrigation works under the supervision

Defendants' Exhibit No. 1—(Continued)

of the Secretary. Should the District default in any manner in the performance of this contract and should it fail to correct said default after request in writing by the Secretary so to do, the United States may take charge and control of all or any part of the irrigation works and operate and maintain the same. Such operation and maintenance by the United States shall continue until the Secretary determines that the default of the District has been corrected and the District is again capable of operating and maintaining all or any part of the irrigation works then being operated and maintained by the United States and that all or a part of the irrigation works should be retransferred to the District for operation and maintenance. When such determination is made, written notice thereof, together with the effective date of the retransfer, shall be given to the District; and the District shall accept the operation and maintenance of the portion of the irrigation works thus retransferred on the effective date, and shall thereafter operate and maintain the same to the satisfaction of the Secretary.

(b) During the time any of the irrigation works are operated and maintained by the United States, the cost of such operation and maintenance shall be paid annually in advance by the District to the United States. Such payments shall be on the basis of annual estimates [254] made by the Secretary, these estimates to be on the basis of the fiscal year then used by the District. Said annual estimate,

Defendants' Exhibit No. 1—(Continued)

hereinafter referred to as the operation and maintenance charge notice, shall contain a statement of the estimated cost of operation and maintenance to be incurred by the United States in the following fiscal year. Such operation and maintenance charge notice shall be furnished to the District on or before May 1 of the fiscal year preceding the fiscal year for which the notice is issued. When the United States takes over initially the operation and maintenance of any part of the irrigation works, the Secretary shall give the District immediately:

(1) An operation and maintenance charge notice of the estimated amount of such charge from the time the United States started operating and maintaining said irrigation works to the end of that fiscal year; and

(2) An operation and maintenance charge notice to cover the following fiscal year, where the initial taking over occurs after May 1 in any fiscal year.

(c) The District shall pay the amounts set out in any such operation and maintenance charge notice to be paid by the District on or before the date or dates as may be fixed by the Secretary, and shall without delay levy whatever special assessments or toll charges are necessary to raise the funds for payment of such amounts.

(d) Whenever in the opinion of the Secretary, funds so advanced will be inadequate to operate and maintain the irrigation [255] works being operated by the United States, he may give a supplemental operation and maintenance charge notice at

Defendants' Exhibit No. 1—(Continued)

any time stating therein the amount of the District's share of the additional funds required, and the District shall advance such additional amount on or before the date specified in the supplemental notice. If funds advanced by the District under this article exceed the actual cost of operation and maintenance for such irrigation works for the year for which advanced, the surplus shall be credited on the operation and maintenance charge payment due for the succeeding year or in case there is no such payment due to the United States for the succeeding year, it shall be applied on the next instalment to be paid by the District to the United States under the provisions of this contract.

District to Levy Assessments for all Purposes and
Collect Annual Operation and Maintenance
Charge in Advance—Reserve Fund to be Es-
tablished.

14. (a) The District shall levy each year and collect in advance, either as an assessment, or as a toll charge, amounts at least sufficient to provide funds to pay the annual instalment to become due that year as provided in Article 11 hereof, the annual operation and maintenance costs and all other charges, costs and expenses of the District, including those under Article 15 hereof, increased by any deficit or decreased by any excess for the previous year. Such operation and maintenance charge shall be levied upon each of the 16,665 irrigable acres of

Defendants' Exhibit No. 1—(Continued)

land in the District, whether water is used or not, and said charge shall be due and payable to the [256] District one-half on or before November 30 of the year in which levied and one-half on or before May 31 of the following year. No water shall be delivered by the District to any tract of land in the District during any time that the operation and maintenance charges due and payable thereon are unpaid.

(b) The annual operation and maintenance charge to be collected by the District as provided in subsection (a) above, shall include an annual amount of one thousand five hundred dollars (\$1,500) for the accumulation of and the maintenance of a reserve fund which shall be in the sum of fifteen thousand dollars (\$15,000). Accumulations shall be made in this fund until it is equal in amount to fifteen thousand dollars (\$15,000). Thereafter, further annual charges shall be collected whenever, as of the time the annual operation and maintenance charge is fixed, the fund has been reduced to an amount less than fifteen thousand dollars (\$15,000). Such fund shall be available only to meet the extraordinary and unforeseen costs of operation and maintenance and repair and betterments of the irrigation works which are determined by the Secretary to be costs in excess of the normal operation and maintenance costs of such works. Such fund shall be maintained apart from other of its funds and shall be deposited with such depository or may be invested in such securities as are approved by the Secretary.

Defendants' Exhibit No. 1—(Continued)
Overhead, Inspection and Repair Charges

to be paid by the District

15. (a) On March 1 of each year, from the effective date of this amendatory contract, until the District's contract obligation [257] is paid in full, in each case for the calendar year ending on the preceding December 31, the following costs shall be paid:

(i) A charge to cover that part of the expense incurred by the United States in the operation of the office of the Chief Engineer, Regional Office, field legal offices, and other detached offices of the Bureau of Reclamation, which in the opinion of the Secretary are properly and equitably chargeable to the District.

(ii) The cost of all installations, repairs, or maintenance by the United States of measuring and controlling devices and automatic gages under the provisions of Article 24 hereof.

(iii) The cost of all inspections under the provisions of Article 26 hereof.

(iv) The cost of repairs to the irrigation works made by the United States under the provisions of Article 25 hereof.

(v) The cost of all crop censuses and investigations under the provisions of Article 27 hereof.

(vi) Such other direct costs for special work performed for the benefit of the District or the project by the United States at the direction of the Secretary, and which in the opinion of the Secretary are for the use and benefit of the District.

Defendants' Exhibit No. 1—(Continued)

(b) The first payment under this article shall be due and payable on March 1 of the first full year of operation under this contract and shall cover the preceding calendar year ending December 31, but the determination of costs hereunder shall not include such items of cost that have accrued and for which the District has made other arrangements for payment or satisfaction. The Secretary shall give the District a statement of such costs as soon as the said costs are ascertainable each year.

(c) In the event that due to lack of appropriations by the Congress, there are no funds available with which to do the work herein covered by subparagraphs (i), (ii), (iii), (iv), (v) and (vi) of subarticle (a) of this article and for which the District agrees to pay as herein provided, the District will pay to the United States in advance the estimated costs of such work as determined by the Secretary. In the event that such costs, as determined by the Secretary, are less than the funds advanced, appropriate credit shall be given upon such payments thereafter coming due under this article as the Secretary determines to be proper.

Contract Obligation of the District to be Lien

16. (a) The contract obligation of the District shall be a lien upon all of the lands within the District described on Exhibit "A" attached hereto and made a part hereof and upon the irrigation system of the District: Provided, however, that the United States will amend this contract and release said lien

Defendants' Exhibit No. 1—(Continued)

in the event the laws of Montana are amended to permit this to be done, and are so amended to make the contract [259] obligation a general obligation of the District but preserving the lien of any tax or assessment for the payment of all amounts to be paid to the United States under any contract between an irrigation district and the United States as a first and prior lien on the land against which levied to the same extent and with like force and effect as taxes levied for state and county purposes.

(b) Whenever required so to do by the Secretary, the District shall give the Regional Director, Region I, Bureau of Reclamation, Boise, Idaho, advance notice of the amount of any assessment, toll or other charge intended to be levied. Whenever practicable, such notices shall be given not less than fifteen (15) days prior to the intended levy.

District to Enforce Payment of Amounts Due

17. (a) The District shall cause to be levied and collected all necessary assessments and will use all the power and resources of the District to meet the obligations of the District to make all payments to be made to the United States pursuant to the provisions of this contract in full on or before the same become due, including the taxing power of the District, the power to withhold delivery of water and to foreclose tax liens on lands in the District.

(b) The District Board shall each year make a reasonable estimate of probable delinquencies in collections based upon past experience, and shall

Defendants' Exhibit No. 1—(Continued)

levy assessments, tolls or other charges sufficiently large against lands of the District, to collect and pay to the United States in full the amounts agreed upon in this [260] contract on or before the dates when the same are due, taking into consideration the discount for prompt payment provided by the laws of the State of Montana, and to secure the funds to meet the annual operation and maintenance costs, notwithstanding any individual delinquency which may occur in the payment of District assessments, tolls or other charges.

Refusal to Deliver Water in Case of Default

18. (a) No irrigation water shall be delivered to any lands as to which payments due on account of the District's obligation to pay instalments to the United States under Article 11 hereof are in arrears more than twelve months or as to which advance payments for operation and maintenance charges are in arrears.

(b) The District grants to the United States the right, power and license to enter on any of the irrigation works of the District to shut off water being delivered in violation of this article. In the event that the United States exercises said right, power and license as herein provided, neither the United States, its officers, nor employees shall be liable for any damages resulting directly or indirectly from any such exercise of said right, power and license, and the District shall hold the United

Defendants' Exhibit No. 1—(Continued)

States, its officers and employees harmless from any and all claims of damages.

Interest Upon Delinquent Payments

19. Every instalment or charge required to be paid to the United States under this contract, and which shall remain unpaid after it shall have become due and payable, shall bear interest at [261] the rate of one-half of one per cent ($\frac{1}{2}\%$) per month from the date of delinquency. The District shall impose on delinquencies in the payment of assessments, or taxes or other charges levied by the District to meet its obligations under the contract, such penalties as it is authorized to impose under the laws of the State of Montana.

Delivery of Water

20. The District (and the United States, while it is operating and maintaining the irrigation works) will operate the irrigation works to the end of making available to each irrigable acre of land in the District during each irrigation season that quantity of water to which it is entitled.

Water to be Delivered to Not More Than 160 Acres
in the Ownership of Any One Person

21. Pursuant to the provisions of the Federal Reclamation Law, no part of the irrigation water supply furnished through the irrigation works constructed or reconstructed by the United States for

Defendants' Exhibit No. 1—(Continued)
the District shall be delivered to more than one hundred sixty (160) acres in the ownership of any one person.

Responsibility of District to Perfect and Acquire
Necessary Water Rights and Keep
Them in Good Standing

22. Should any additional water rights be needed to supply an adequate amount of water for irrigation of the 16,665 acres of irrigable land in the District, the same shall be acquired by the District at its expense, and the District shall take such steps as may be deemed necessary by the Secretary to perfect its water rights and to keep the same in good standing. [262]

United States Not Liable for Water Shortage

23. On account of accidents, failure of power supply, drought, inaccuracy in distribution, canal breaks, hostile diversion, prior or superior claims, or other causes, there may occur at times a shortage in the water supply for lands of the District. In no event, however, whatsoever the cause, shall any liability accrue against the United States, or any of its officers, agents or employees, for any damages, direct or indirect, arising from such shortage; nor shall any obligation provided for herein be reduced or deferred because of any such shortage or damages.

Defendants' Exhibit No. 1—(Continued)
Measuring and Gaging Devices to Be Maintained
by District

24. The District shall, at its own cost and expense, install and maintain to the satisfaction of the Secretary, all necessary measuring and controlling devices needed in relation to the operation of the irrigation works and for a proper record of the water supply and a proper regulation of the same. Should the District fail to install and maintain such devices or to maintain a satisfactory rotation system to the satisfaction of the Secretary, the United States may install and maintain the same or any part thereof and the cost and expense incident thereto shall be paid by the District to the United States as provided in Article 15 hereof.

Care, Operation and Maintenance
of Irrigation Works

25. (a) The District shall continue to care for, operate and maintain its irrigation works, and shall keep said works in good repair, and shall operate and maintain the same and deliver water [263] therefrom to lands within the District only in such a manner that the irrigation works of the District will be in good and efficient condition and of sufficient capacity at all times for the diversion and distribution of irrigation water needed to irrigate 16,665 acres of irrigable land, and will care for, operate and maintain its irrigation works in full compliance with the provisions of this contract, the

Defendants' Exhibit No. 1—(Continued)

laws of the United States and the State of Montana, and with the regulations of the Secretary now or hereafter made pursuant to the Federal Reclamation Law and the terms of this contract.

(b) The District shall hold the United States harmless from any claim for damages, injuries or claims of any other nature arising from the operation and maintenance of the said irrigation works by the District.

(c) Should the District fail at any time to repair and maintain any part of its irrigation works which, in the opinion of the Secretary, is in a condition unfit for service, the United States may, after giving the District ten (10) days' notice to do such repair and maintenance work and after its failure to undertake the same within that time, perform the repair and maintenance work which the United States deems necessary and shall be reimbursed by the District for all costs and expenses incident thereto.

Inspection by the United States

26. The Secretary may cause to be made from time to time a reasonable inspection of the irrigation works of the District for the [264] purpose of ascertaining whether the terms of this contract are being carried out by the District. Such inspection shall include examinations of the irrigation works and of the books, records and papers of the District, together with examinations in the proper office of the Bureau of Reclamation of all contracts.

Defendants' Exhibit No. 1—(Continued)

papers, plans, records and programs connected with said irrigation works. The actual costs, as determined by the Secretary, of such inspection shall be charged to the District, which determination of costs shall be conclusive and binding on the District.

Crop Reports and Census

27. (a) The District shall keep an accurate record of all crops raised and agricultural or livestock products produced on land in the District. The District shall furnish the United States on or before December 31 of each year a report on such crops, agricultural and livestock products, the report to be in the form prescribed by the United States.

(b) At such times as the Secretary deems it necessary or desirable, he may cause a crop census to be taken, and an investigation of the per-acre income to be made, of all or any part of the lands in the District, but such census and investigation shall not be taken oftener than once each calendar year. Such a census and investigation shall be for the purpose of checking the crop reports furnished to the United States by the District and of furnishing an independent source of information as to crops produced and crop [265] returns from the lands in the District. In connection with such a census or investigation, the Secretary may require information to be given under oath. The cost of such crop census and investigation shall be paid by the District as provided by Article 15 hereof.

Defendants' Exhibit No. 1—(Continued)

Books, Records and Reports

28. The District shall: (1) install and maintain a modern accounting system, to be acceptable to the Secretary, showing all financial transactions of the District, and furnish such financial statements and reports as may be required from time to time by the Secretary; and (2) keep such other records as the Secretary may request, in the manner and form he may desire, and submit such reports based thereon as he may require from time to time.

Access to Books and Records

29. Subject to applicable Federal laws and regulations, the Secretary of the District or his representative shall have full and free access at all reasonable times to the project accounting records and supporting documents of the Bureau of Reclamation relating to the construction, operation and maintenance of the project and the status of the accounts concerning the District's payments of construction and operation and maintenance charges and any other charge or charges due from the District to the United States, with the right at any time during office hours to make copies thereof. Subject to applicable state laws and regulations, the proper representatives of the United States shall have similar rights with respects to the accounts and records of the District. [266]

Confirmation of Contract

30. The Board of Commissioners shall furnish

Defendants' Exhibit No. 1—(Continued)

the United States with certified copies of all petitions and proceedings taken to authorize the said Board to execute this Contract, as well as certified copies of all proceedings taken in the district court of the state judicial district wherein is located the office of said Board by which the proceedings of the Board and of said District leading up to the making of this contract and the validity of the terms thereof shall be judicially examined, approved and affirmed and this contract, when executed, adjudged to be a lawful, valid and binding obligation of the District. If appeal is taken, certified copies of proceedings on appeal, including the final decree, shall be furnished the United States. If, in the opinion of the Secretary, satisfactory confirmatory decrees are not secured promptly as herein provided, the Secretary by giving notice in writing to the District may terminate negotiations for this contract. In the event of such termination, the Government-District contract shall be deemed as having been continuously in full force and effect, unmodified by this contract, and all sums due the United States under said Government-District contract which have not been paid or have been paid only in part because of the negotiation of this contract shall become immediately due and payable.

District to Employ Manager

31. During the term of this contract, the District will employ, as manager or superintendent, a competent irrigation engineer or [267] manager who

Defendants' Exhibit No. 1—(Continued)

shall have had at least three (3) years' experience as manager or superintendent in the operation of similar works, the selection of such person to be subject to the approval of the Secretary. Upon notice from the Secretary that any manager or superintendent employed by the District is or has become unsatisfactory, the District Board will, as often as such notice is given, promptly terminate the employment of such unsatisfactory manager or superintendent and employ one approved by the Secretary.

Changes in District Organization

32. (a) While this contract is in effect, no change shall be made in the District, either by inclusion or exclusion of lands, by partial or total consolidation or merger with another district, by proceedings to dissolve or otherwise, except with the consent of the Secretary evidenced in writing, and no petitions or requests for any such District changes shall be considered by the District until after the same have been approved by the Secretary. Certified copies of such proceedings for changes in District boundaries shall be furnished to the United States immediately upon completion thereof.

(b) If and when required by the United States, the District will exclude from the boundaries of the District all lands in excess of the said 16,665 acres.

Defendants' Exhibit No. 1—(Continued)

Performance of Work with Contributed Funds

33. (a) Pursuant to the Act of March 4, 1921 (41 Stat. 1367, 1404), the United States, at its option, may perform with funds contributed by the District any construction or maintenance work within the authority of the District but which is not otherwise provided for by this contract. If the United States determines that it will undertake any such work, funds therefor shall be advanced by the District as [268] directed by the Secretary. The advance shall be accompanied by a certified copy of a resolution of the District's Board of Commissioners describing the work to be done and authorizing its performance by the United States with the District's funds.

(b) After completion of any work so undertaken, the United States shall furnish the District with a statement of the cost of the work done. Any unexpended balance of the funds advanced will be refunded to the District or applied as otherwise directed by the District; and the amount by which the cost of such work exceeds the amount of funds advanced therefor shall be paid by the District to the United States as the Secretary may direct.

Secretary the Arbiter—Secretary's Acts, Decisions
and Determinations Conclusive

34. In the event of disputes between the parties hereto arising out of this contract involving questions of fact, and so far as the provisions hereof

Defendants' Exhibit No. 1—(Continued)

require a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions and as the one required to make such determination of fact; and his decision shall be conclusive and binding on the parties hereto. In all acts, matters and determinations provided in this contract to be done, determined or decided by the Secretary or by the United States, the acts, decisions, findings and determinations by the Secretary shall be final and conclusive and shall be accepted as final and conclusive by all the parties to this contract and by all persons [269] claiming any rights under or by virtue of this contract or in anywise based upon or arising out of this contract or any act or proceeding carried on thereunder.

Rules and Regulations

35. The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make rules and regulations, and to add to and modify them, as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract, and to cover any details of the administration or interpretation of the same which are not covered by express provisions of this contract. The District shall observe such rules and regulations.

Representative of Secretary

36. Where this contract provides for action by

Defendants' Exhibit No. 1—(Continued)

the Secretary, said action may be taken for and on behalf of the Secretary by his representative duly authorized in writing by him.

Effective Date of Contract

37. The effective date of this contract shall be the date upon which this contract is executed by the Secretary, or his duly authorized representative, on behalf of the United States of America, after approval by the Congress in accordance with Section 7 of the Reclamation Project Act of 1939. [270]

Notices

38. Any notice, demand or request required or authorized by this contract shall be deemed properly given, except where otherwise herein specifically provided, if mailed, postage prepaid to the Regional Director, Region I, Bureau of Reclamation, P.O. Box 937, Boise, Idaho, on behalf of the United States; and to the Secretary, Bitter Root Irrigation District, Hamilton, Montana, on behalf of the District. The designation of the person to be notified or the address of such person may be changed at any time by similar notice.

Contingent on Appropriations or Allotment
of Funds

39. The expenditure of any money or the performance of any work by the United States herein provided for, which may require appropriations of

Defendants' Exhibit No. 1—(Continued)

money by Congress or the allotment of Federal funds, shall be contingent on such appropriations or allotments being made. The failure of Congress to appropriate funds, or the failure of any allotment of funds, shall not, however, relieve the District from any obligations theretofore accrued under this contract, nor give the District the right to terminate this contract as to any of its executory features. No liability shall accrue against the United States in case such funds are not so appropriated or allotted.

Assignments Prohibited; Successors and
Assigns Obligated

40. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment [271] or transfer of this contract, or any part thereof or interest therein, shall be valid until approved by the Secretary.

Landowners Acceptance of Benefits
Deemed Consent

41. Every landholder in the District who accepts the benefits of this contract by payment of any assessment at a rate lower than that which would otherwise be in effect against his land, by acceptance and use of water at times when such lands on account of delinquency in payment under the terms of the Government-District contract would not be entitled to the delivery of water under the terms

Defendants' Exhibit No. 1—(Continued)

of that contract had this contract not been made or not been applicable to such land, or by acceptance of any other benefit under this contract, thereby consents to all the provisions of this contract and waives any objections thereto.

Discrimination Against Employees or Applicants
for Employment Prohibited

42. The District shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and shall require an identical provision to be included in contracts relating to the performance of this contract. This provision, however, does not refer to, extend to, or cover the activities of the District which are not related to or involved in the performance of this contract. [272]

DEFENDANTS' EXHIBIT No. 2

This Agreement, Made and entered into this twenty-fourth day of April, A.D., 1952, by and between Bernhard Jannsen and Anna Jannsen, husband and wife, of the County of Ravalli and State of Montana, parties of the first part, and Glenn A. Woodbury and Pearl Woodbury, husband and wife, parties of the second part;

Witnesseth, that if the said parties of the second part shall first make the payments and perform the

covenants hereinafter mentioned on their part to be made and performed, the said parties of the first part hereby covenants and agree to convey and assure to the said parties of the second part, in fee simple, clear of all encumbrances whatever, by good and sufficient Deed, the lots, pieces, or parcels of ground situate in the County of Ravalli, and State of Montana, known and described as North half of the Northeast quarter of the Southeast quarter ($N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$) Section Thirty-four (34), Township Ten (10) North, Range Nineteen (19) West; and the West half of the Northwest quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Northwest quarter of the Southwest quarter ($NW\frac{1}{4}SW\frac{1}{4}$) of Section Thirty-five (35), Township Ten (10) North, Range Nineteen (19) West.

And the said parties of the second part hereby covenants and agree to pay to the said parties of the first part the sum of Twenty-eight thousand and no/100 Dollars (\$28,000.00), payable at the First State Bank, Stevensville, Montana, in the following manner:

The sum of \$8,100.00 at or before the execution of this contract;

The sum of \$16,200.00 to be paid in annual installments of \$1,000.00 per year on or before the first day of November of each year, commencing with November 1, 1953, together with interest at the rate of three per cent (3%) per annum.

The parties of the second part agree to assume that Federal Land Bank mortgage in the amount of \$3,700.00.

The parties of the second part agree to pay all taxes, assessments or impositions legally imposed upon said land from date, and current taxes to be pro-rated as of this date, and in case of the failure of the said parties of the second part to make either of the payments, or interest thereon, or any part thereof or perform any of the covenants on their part hereby made and entered into, then the whole of said payments and interest shall, at the election of said first parties become immediately due and payable, and this contract shall, at the option of the parties of the first part, be forfeited and determined by giving to the said second parties sixty (60) days' notice, in writing, of the intention of the first parties to cancel and determine this contract, setting forth in said notice the amount due upon said contract, and the time and place, when and where payment can be made by said second parties. [274]

Possession shall be delivered to the parties of the second part on the 5th day of June, 1952.

It is mutually understood and agreed by and between the parties to this contract that sixty days is a reasonable and sufficient notice to be given to said second parties, in case of failure to perform any of the covenants on their part hereby made and entered into, and shall be sufficient to cancel all obligations hereunto on the part of the said first parties and fully re-invest them with all right, title and interest hereby agreed to be conveyed, and the parties of the second part shall forfeit all payments made by them on this contract, and their right, title and interest in all buildings, fences or other im-

improvements whatsoever, and such payments and improvements shall be retained by the said parties of the first part, in full satisfaction and as a reasonable rental for the property above described and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid.

It is mutually understood and agreed that the parties of the second part will maintain \$4,800.00 insurance upon all buildings on the premises for the duration of this contract.

It is mutually agreed, by and between the parties that for the consideration hereinbefore mentioned, the parties of the first part agree to deliver as a portion of the above described real estate one oil tank and one hot water heater.

It is mutually agreed, by and between the parties hereto, that the time of payment shall be an essential part of this contract; and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

A copy of this contract, together with the deed, shall be placed in escrow at the First State Bank at Stevensville, Montana, with instructions to deliver said deed to the parties of the second part upon satisfactory completion of this contract.

The above bank is instructed to deduct the cost of the escrow and the cost of Internal Revenue stamps from the payments made by the party of the second part and deliver the remainder to the party of the first part. [275]

In Testimony Whereof, both parties have hereunto set their hands and seals the day and year hereinabove written.

/s/ Bernhard Jannsen

/s/ Anna Jannsen

/s/ Glenn Woodbury

/s/ Pearl Woodbury

State of Montana,
County of Ravalli—ss.

On this twenty-fourth day of April, 1952, before me, A Notary Public for the State of Montana, personally appeared Bernhard Jannsen, Anna Jannsen, Glenn A. Woodbury and Pearl Woodbury, to me known to be the persons described in, and who executed the foregoing instrument, and acknowledged that they executed the same.

[Seal] /s/ Frances M. Brown,

Notary Public for the State of Montana, residing
at Stevensville, Montana. [276]

[Endorsed]: No. 14782. United States Court of Appeals for the Ninth Circuit. Glenn Woodbury and Pearl Woodbury, Appellants, vs. Alfred Clermont and Marguerite I. Clermont, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: May 31, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14782

ALFRED I. CLERMONT and MARGUERITE I.
CLERMONT, Plaintiffs,
vs.

GLENN WOODBURY and PEARL WOOD-
BURY, Defendants.

STATEMENT OF POINTS

The appellants herein adopt the Statement of Points and Designation of Record filed in the District Court as the Statement of Points and Desig-

nation of Record in the United States Court of Appeals for the Ninth Circuit in the above entitled cause.

Dated this 6th day of July, 1955.

GLENN WOODBURY and
PEARL WOODBURY,

Appellants

/s/ By LEIF ERICKSON,

Attorney for Appellants

[Endorsed]: Filed July 9, 1955. Paul P. O'Brien,
Clerk.